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No. 05-

IN THE

Supreme Court of the United States

THOMAS JOHNSON, *et al.*,

Petitioners,

v.

JEB BUSH, Governor of Florida, *et al.*,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Is a permanent felony disenfranchisement provision – like all other voting qualifications – subject to challenge under Section 2 of the Voting Rights Act on the ground that it results in a denial of the right to vote on account of race?

2. When a provision was enacted by a state for the purpose of disqualifying otherwise eligible black voters, and it has disenfranchised blacks at twice the rate of others for more than one hundred years, does the state bear the evidentiary burdens of production and persuasion in proving that it reenacted the provision for an independent, nondiscriminatory reason sufficient to purge its unconstitutional taint?

PARTIES TO PROCEEDING

Petitioners are eight Florida citizens – Thomas Johnson, Derrick Andre Thomas, Eric Robinson, Omali Yeshitela,[1] Adam Hernandez, Kathryn Williams-Carpenter, Jau'dohn Hicks, and John Hanes – who were plaintiffs in the district court. They brought this suit in their own right and as representatives of a certified class. The class consists of more than 613,000 Florida citizens who have fully served sentences of incarceration, probation, or parole on felony convictions, but who, under Florida's felony disenfranchisement provision, remain barred from voting for life or until granted discretionary executive clemency.

The State Respondents are the members of Florida's Clemency Board – Jeb Bush, Governor; Katherine Harris, Secretary of State; Robert Butterworth, Attorney General; Robert Milligan, Comptroller; William Nelson, Treasurer; Robert Crawford, Commissioner of Agriculture; and Thomas Gallagher, Commissioner of Education – in their official capacities. They were defendants in the district court and appellees in the court of appeals. The County Defendants are Beverly Hall, Jane Carroll, Pam Iorio, David C. Leahy, William Cowles, and Deborah Clark, the county supervisors of elections for Alachua, Broward, Hillsborough, Miami-Dade, Orange, and Pinellas counties, respectively, in their official capacities. The district court certified a defendant class of county election supervisors, who abated their participation in the case pending the determination of liability.

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[1] On January 17, 2001, the district court dismissed Omali Yeshitela, whose civil rights had been restored.

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PETITION FOR A WRIT OF CERTIORARI

Thomas Johnson *et al.* respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Eleventh Circuit in this case.

OPINIONS BELOW

The opinion of the en banc United States Court of Appeals for the Eleventh Circuit is reported at 405 F.3d 1214 (11th Cir. 2005) (en banc) (Appendix to Petition ("App.") at 1a). The panel opinion that was vacated by the en banc court is reported at 353 F.3d 1287 (11th Cir. 2003) (App. 86a), *vacated by* 377 F.3d 1163 (11th Cir. 2004) (en banc) (App. 84a). The opinion of the district court is reported at 214 F. Supp. 2d 1333 (S.D. Fla. 2002) (App. 150a).

JURISDICTION

The Court of Appeals entered judgment on April 12, 2005. This Court has jurisdiction to review the judgment under 28 U.S.C. § 1254(1). The district court had jurisdiction pursuant to 28 U.S.C. §§ 1331 and 1343(a)(4). On July 1, 2005, Justice Kennedy granted petitioners' motion to extend their time to file this petition to and including August 10, 2005.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fourteenth and Fifteenth Amendments to the United States Constitution are reproduced in the Appendix (App. 186a-88a).

Section 2 of the Voting Rights Act of 1965, 42 U.S.C. § 1973, is reproduced in the Appendix (App. 189a).

Three provisions of various Florida Constitutions are reproduced in the Appendix: the current felony

disenfranchisement provision, Fla. Const. art. VI, § 4 (1968) (App. 192a); its predecessor provision, Fla. Const. of 1868, art. XIV, § 2 (App. 190a); and an additional provision pertaining to criminal disenfranchisement that was omitted in 1968, Fla. Const. of 1868, art. VI, § 5 (1885) (App. 191a).

INTRODUCTION

This is a class action on behalf of more than 613,000 citizens of Florida who are barred from voting unless and until they receive discretionary clemency, although they have served their felony sentences. Petitioners challenge the Florida Constitution's felony disenfranchisement provision under the Voting Rights Act ("VRA") and the Fourteenth and Fifteenth Amendments to the United States Constitution. The United States District Court for the Southern District of Florida granted summary judgment in favor of the State on both the statutory and the constitutional claims. A divided panel of the Court of Appeals for the Eleventh Circuit reversed, but the en banc court later vacated the panel opinion and affirmed summary judgment for the State. Two issues are presented: (1) whether Florida's felony disenfranchisement provision, which has disproportionately denied the right to vote to African-Americans for more than one hundred years, is subject to challenge under the VRA; and (2) whether the constitutional challenges to the provision survive, despite its reenactment without explanation in 1968, because it was originally enacted for the purpose of suppressing black political participation and has consistently achieved that result.

In 1868, following the Civil War, the abolition of slavery, and Florida's readmission to the Union, Florida enacted a new constitution. A crucial component of this constitution was a provision permanently disenfranchising people with felony convictions unless their civil rights were restored through an executive act of grace. Fla. Const. of

1868, art. XIV, § 2 (App. 190a). Petitioners presented what the district court characterized as "an abundance of expert testimony about the historical background of Florida's felon disenfranchisement scheme," including "that the policy was enacted originally in 1868 with the particular discriminatory purpose of keeping blacks from voting." *Johnson v. Bush*, 214 F. Supp. 2d 1333, 1338-39 (S.D. Fla. 2002) (App. 159a); *see, e.g.*, Expert Report of Jerrell H. Shofner, Ph.D. ("Shofner Rep.") (App. 197a). The en banc court of appeals assumed an original discriminatory purpose, acceding to the requirement that it read the record in the light most favorable to petitioners before affirming summary judgment against them. *Johnson v. Bush*, 405 F.3d 1214, 1223 (11th Cir. 2005) (en banc) (App. 18a).

In 1968, faced with an upsurge in black political participation triggered by Congress's adoption of the VRA in 1965, Florida reenacted its permanent felony disenfranchisement provision, even though the policy had disenfranchised blacks at twice the rate of others throughout its hundred-year history. Deposition of Lance deHaven Smith at 173, 181-83 ("deHaven Smith Dep."); Expert Report of Christopher Uggen, Ph.D. ("Uggen Rep."), at 3, 22 (App. 259a-60a, 296a-97a); Christopher Uggen, Addendum, Florida Disenfranchised Felon and Ex-Felon Populations (Best Estimates for 1967 and 1968) ("Uggen Add.") (App. 301a-02a). Florida did not articulate a reason for continuing to disenfranchise first-time offenders for life. This policy is now shared by only three other states: Alabama, Kentucky, and Virginia. The Sentencing Project, *Felony Disenfranchisement Laws in the United States* (2005), *at* http://www.sentencingproject.org/pdfs/1046.pdf.[2]

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[2] The Sentencing Project lists Iowa as an additional permanent disenfranchisement state but notes that the Governor recently issued an executive order restoring voting rights to all people in the state who have completed their criminal sentences. *Id.*

Florida's permanent felony disenfranchisement provision remains in force today. Its application to those who have completed their sentences denies the franchise to 5.2% of Florida's total voting-age population. Uggen Rep. at 1, 22 (App. 256a, 296a-97a). One of the starkest consequences of the provision is its disproportionate disenfranchisement of African-Americans, effectuating the State's 1868 intent. Excluding those who are still serving felony sentences, the law disenfranchises 10.5% of voting-age African-Americans (approximately 167,000 men and women), as compared to 4.4% of the non-African-American voting-age population. *Id.*

STATEMENT OF THE CASE

By the close of discovery, petitioners had produced expert evidence that four provisions of the 1868 constitution relevant to the franchise were "intentionally racially discriminatory." Shofner Rep. at 2 (App. 199a). These provisions apportioned representation so as to dilute black political power; gave the governor the power to appoint most local officials, thereby depriving majority-black localities of the power to elect their leaders; enfranchised ex-Confederates; and disenfranchised people with felony convictions. The "Radical" Republicans, whose primary goal was to empower newly freed slaves, opposed all four provisions, but an alliance of "Moderate" Republicans and ex-Confederates excluded the "Radicals" from the 1868 Constitutional Convention. *Id.* Some of the authors of the 1868 constitution later boasted that they had helped "prevent a negro legislature," *id.* at 16 (App. 224a), and had kept Florida from being "niggerized," Jerrell H. Shofner, *The Constitution of 1868*, Florida Hist. Q., Apr. 1963, at 374 (App. 305a). More such evidence might exist today had the members of the 1868 Convention not voted to purge the official record. J. Proc. Const. Convention St. Fla., Feb. 20, 1868, at 48-49 (App. 306a-08a).

With regard to the 1968 reenactment of the felony disenfranchisement provision, Florida adopted a policy of silence, creating no official record of the reasoning underlying the decision to perpetuate permanent felony disenfranchisement. Thus, the parties in this case stipulated that "[t]here is no evidence in the R.H. Gray state archives [Florida's primary archival depository] showing that any[one] . . . associated with the 1968 constitutional revision process ever considered the racial implications or consequences of the felon disenfranchisement provision." Joint Pretrial Stipulation of the Parties at 22. Of course, there is also no evidence in the current record that the decision to reenact was untainted by the State's racial motives.[3] The district court admitted only one document related to the 1968 reenactment – the minutes of the Suffrage and Elections Committee Meeting of February 2 and 3, 1966, offered by the State. Neither this document nor any other in the record nor any improperly excluded document reveals a legitimate reason for the legislature's decision in 1968 to continue to disenfranchise people with felony convictions for life.

The discriminatory impact of the 1868 provision has persisted for over a century, disenfranchising blacks at far higher rates than others. At the end of the nineteenth century, approximately 48% of Florida's general population was of African descent, deHaven Smith Dep. at 173, while at least 82% of Florida's prison population was African-American, *id.* at 180-83. From the 1968 revision to the present, African-Americans have been disenfranchised because of felony convictions at more than twice the rate of

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[3] The district court improperly excluded petitioners' expert report on the history of the 1968 reenactment, 4/18/02 Order Granting Mot. to Exclude Expert Richard Scher (App. 179a-85a), excluded the archival documents that informed the report, 5/30/02 Order Denying Pls.' Mot. to Supplement Record (App. 171a-72a), and then relied on portions of the excluded report in its summary judgment decision, *Johnson*, 214 F. Supp. 2d at 1339 (App. 160a-61a).

others. Uggen Rep. at 3, 22 (App. 259a-60a, 296a-97a); Uggen Add. (App. 301a-02a).

This disproportionate disenfranchisement is not simply the result of higher crime rates in the black community. Petitioners introduced evidence that Florida used its criminal justice system to subjugate black citizens from the early days of emancipation until well into the twentieth century. The Black Codes of the late 1860s defined a host of crimes – including assault on a white female, vagrancy, and larceny (amended to include the taking of cotton, corn, and other agricultural products) – in a manner that targeted ex-slaves. Shofner Rep. at 6-7 (App. 206a-08a). Conviction of these and other "infamous crimes" resulted in disenfranchisement under the 1868 constitution. *Id.* at 18-19 (App. 229a-30a).

More than a century later, blacks were still systematically excluded from criminal juries, *see, e.g., Spencer v. State*, 545 So. 2d 1352, 1354-55 (Fla. 1989), and the use of peremptory challenges to exclude blacks from juries continued longer still, *see, e.g., Brown v. State*, 733 So. 2d 1128, 1129-30 (Fla. Dist. Ct. App. 1999); *Foster v. State*, 732 So. 2d 22, 23-24 (Fla. Dist. Ct. App. 1999). Thousands of members of the plaintiff class were convicted during the 1960s and 1970s when these practices were commonplace.

And still today in Florida, African-Americans are convicted of felonies at a rate far higher than can be explained by their relative participation in crime. Among those who commit crimes, blacks are disproportionately likely to be arrested and, once arrested, they are disproportionately likely to be convicted. Indeed, at least 25-36% of the racial disparity in felony convictions cannot be attributed to differential involvement in criminal activity. Expert Report of Theodore Chiricos, Ph.D. ("Chiricos Rep."), at 7-13, 18-20 & tbls. 2, 3, 4, 9 (App. 320a-27a, 332a-35a, 356a-60a). The discretionary clemency process exacerbates these racial disparities because the rights-restoration rate is significantly lower for African-American

applicants than for others. Uggen Rep. at 5-11 (App. 263a-70a); Supplement to Uggen Rep. at 1-8 ("Uggen Supp.") (App. 361a-73a).[4]

Based on this evidence, petitioners cross-moved for summary judgment on January 18, 2002; the State had moved for summary judgment two weeks earlier. The district court granted the State's summary judgment motion on all claims on July 18, 2002. *Johnson*, 214 F. Supp. 2d 1333 (App. 150a). Petitioners appealed to the Court of Appeals for the Eleventh Circuit.

On December 19, 2003, a divided panel of the Eleventh Circuit reversed the district court's grant of summary judgment. *Johnson v. Bush*, 353 F.3d 1287 (11th Cir. 2003) (App. 86a). With regard to the claim under Section 2 of the VRA, the court ruled that the district court had failed both to apply the proper standard and to consider the relevant evidence under the totality of circumstances test. *Id.* at 1303-06 & n.25 (App. 112a-21a & n.25). Viewing the evidence in the light most favorable to petitioners, the court found genuine issues of material fact and remanded for trial on a full evidentiary record. *Id.* at 1306 (App. 118a-20a). The majority also concluded that petitioners' extensive evidence of the discriminatory intent behind Florida's 1868 felony disenfranchisement provision had created a genuine issue of fact sufficient to withstand summary judgment on their

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[4] Petitioners' additional evidence of racial bias in Florida's criminal justice system – five reports of the Florida Supreme Court's Racial and Ethnic Bias Study Commission and expert testimony concerning the tendency of Florida's discretionary law enforcement practices to target African-American communities – was erroneously excluded by the district court as untimely based on an ambiguous order. 4/4/02 Order Granting in Part Mot. to Exclude Out-of-Time Evidence (App. 183a-85a). The district court also erroneously excluded as irrelevant an expert report detailing racially polarized voting patterns and analyzing their interaction with Florida's felony disenfranchisement policy. 4/18/02 Order Granting in Part Mot. to Exclude Expert Richard Engstrom (App. 173a-78a).

Fourteenth and Fifteenth Amendment claims. *Id.* at 1295-96 (App. 94a-97a). The burden then shifted to the State either to rebut that showing or to prove that the provision was "subsequently reenacted on the basis of an independent, non-discriminatory purpose." *Id.* at 1301 (App. 106a-07a). The court remanded for further discovery and trial of these claims. *Id.* at 1302 & n.19 (App. 110a-11a & n.19).

On July 20, 2004, the Eleventh Circuit vacated the panel's decision and ordered rehearing en banc. *Johnson v. Bush*, 377 F.3d 1163 (11th Cir. 2004) (en banc) (App. 85a). On April 12, 2005, the en banc court of appeals affirmed the district court's grant of summary judgment to the State. *Johnson*, 405 F.3d 1214 (App. 1a). Explicitly acknowledging that "[t]he Circuits are split on this issue," *id.* at 1227 (App. 25a), the majority held that Section 2 of the VRA has no application to felony disenfranchisement, *id.* at 1234 (App. 43a). The court reasoned, based on this Court's decision in *Richardson v. Ramirez*, 418 U.S. 24 (1974), that the Penalty Clause in Section 2 of the Fourteenth Amendment guarantees "Florida's discretion to deny the vote to convicted felons," *Johnson*, 405 F.3d at 1228-29 (App. 29a-30a). "[I]nterpreting Section 2 of the Voting Rights Act to deny Florida the discretion to disenfranchise felons" would therefore "allow[ ] a congressional statute to override the text of the Constitution." *Id.* at 1229 (App. 30a). To avoid what it perceived as the consequent "grave constitutional concerns," *id.* at 1234 (App. 43a), the court read felony disenfranchisement out of the otherwise comprehensive "voting qualification[s] or prerequisite[s] to voting" covered by Section 2 of the VRA, 42 U.S.C. § 1973(a). Having held the VRA inapposite, the court did not determine the sufficiency of petitioners' evidence of the totality of the circumstances in which Florida's felony disenfranchisement law interacts with racial bias in the criminal justice system and the lingering effects of other racial exclusion to result in the disproportionate disenfranchisement of African-

Americans. *But cf. Johnson*, 405 F.3d at 1230 n.31 (discounting, in dicta, evidence submitted by petitioners).

As to the constitutional claims, the court of appeals "assume[d], without deciding, that racial animus motivated the adoption of Florida's 1868 disenfranchisement law." *Johnson*, 405 F.3d at 1223 (App. 18a). Focusing instead on Florida's 1968 reenactment of the provision, the majority emphasized two facts: first, the mere existence of a four-stage revision process; and second, the elimination of a distinct but largely redundant provision of the Florida Constitution that specified crimes triggering disenfranchisement, including certain misdemeanors. *Id.* at 1220-22 (App. 11a-15a) (citing Fla. Const. of 1868, art. VI, § 5 (1885)). Although both before and after the 1968 reenactment the Florida Constitution disenfranchised people with felony convictions unless and until they received clemency, the court of appeals deemed the 1968 reenactment a substantive alteration.[5] *Id.* The court then concluded that this reenactment, made without explanation of its purpose, eliminated the taint from the discriminatory 1868 provision. *Id.* at 1224 (App. 20a-21a). The Eleventh Circuit rejected petitioners' argument that under this Court's holding in *United States v. Fordice*, 505 U.S. 717 (1992), Florida has the burden of establishing a decisive break with the discriminatory origins of its felony disenfranchisement law. *Johnson*, 405 F.3d at 1225-26 (App. 22a-25a).

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[5] The 1868 provision read, in relevant part: "[N]or shall any person convicted of felony be qualified to vote at any election unless restored to civil rights." Fla. Const. of 1868, art. XIV, § 2 (App. 190a). The 1968 provision reads, in relevant part: "No person convicted of a felony . . . shall be qualified to vote . . . until restoration of civil rights . . . ." Fla. Const. art. VI, § 4 (1968) (App. 192a).

REASONS FOR GRANTING THE PETITION

The Court should grant this petition for two reasons. First, the Court should resolve the split between the Eleventh and Ninth Circuits on the question whether Section 2 of the VRA applies to felony disenfranchisement laws. The answer to this question will determine what redress is available to the hundreds of thousands of minority citizens who now have no say in who governs them. Second, the lower courts are in disarray regarding the evidentiary rules to be followed in the many cases that involve an inquiry into improper governmental purpose. The Court should make explicit its consistent approach: that the state bears the evidentiary burdens of production and persuasion, and must present evidence sufficient to prove that legitimate reasons for a reenactment cure a policy tainted by an original discriminatory purpose.

I. The Court Should Grant the Petition to Resolve the Split in the Circuits on Whether Section 2 of the VRA May Be Applied to Felony Disenfranchisement Laws.

This case squarely presents the important threshold issue of whether felony disenfranchisement laws are actionable under Section 2 of the VRA. Section 2 prohibits "voting qualification[s] or prerequisite[s] to voting" that result in a denial of the right to vote on account of race. 42 U.S.C. § 1973(a). No court has ever placed any voting qualification other than a felony disenfranchisement provision beyond the reach of Section 2. The question of coverage turns on the language of the statute and, in light of the Eleventh Circuit's holding, Congress's enforcement power under the Reconstruction Amendments.

A. The Circuits Are Split on the Question Whether Felony Disenfranchisement Laws Are Subject to Challenge Under Section 2 of the VRA.

In holding that Florida's felony disenfranchisement law is not subject to challenge under Section 2, the Eleventh Circuit acknowledged that "[t]he Circuits are split on this issue." *Johnson*, 405 F.3d at 1227 (App. 25a); *see also Muntaqim v. Coombe*, 366 F.3d 102, 104 (2d Cir.) ("[W]e recognize that this is a difficult question that can ultimately be resolved only by a determination of the United States Supreme Court . . . ."), *cert. denied*, 125 S. Ct. 480, *and reh'g en banc granted*, 396 F.3d 95 (2d Cir. 2004); *Farrakhan v. Washington*, 359 F.3d 1116, 1126-27 (9th Cir. 2004) (Kozinski, J., dissenting from denial of rehearing en banc).

There is a direct conflict between the Ninth and the Eleventh Circuits. The Ninth Circuit, in a straightforward application of the text of the statute, held that a claim of vote denial is cognizable under Section 2 of the VRA because felony disenfranchisement is plainly a "voting qualification" within the ordinary meaning of the statutory term. *Farrakhan v. Washington*, 338 F.3d 1009, 1016 (9th Cir. 2003), *cert. denied sub nom. Locke v. Farrakhan*, 125 S. Ct. 477 (2004). Thus, whether a particular state's felony disenfranchisement law creates racial inequality in voting is to be determined based on the merits of the individual case. *Id.* at 1016-17. In contrast, in the case before this Court, the Eleventh Circuit did not focus on the text of Section 2, but rather reasoned that without a clear congressional statement of specific intent, the Penalty Clause of the Fourteenth Amendment places felony disenfranchisement laws, unlike all other voting qualifications, beyond the reach of Congress's power to redress race discrimination in voting. *See Johnson*, 405 F.3d at 1228-34 (App. 29a-43a).

Like the Ninth Circuit, the Fourth and Sixth Circuits have allowed challenges to state felony disenfranchisement laws to proceed under Section 2, and these courts did not even question whether such laws are covered by the VRA.

Howard v. Gilmore, No. 99-2285, 2000 WL 203984, at *1 (4th Cir. Feb. 23, 2000) (unpublished) (App. 193a-96a) (dismissing claim for failure to plead that there was "any nexus between the disenfranchisement of felons and race");[6] *Wesley v. Collins*, 791 F.2d 1255, 1261 (6th Cir. 1986) (assuming the applicability of Section 2 to a felony disenfranchisement statute, but concluding that "in the context of the 'totality of the circumstances,' it is apparent that the challenged legislation does not violate the Voting Rights Act").

In addition, the Second Circuit has twice considered the issue without arriving at a binding conclusion. First, sitting en banc in *Baker v. Pataki*, 85 F.3d 919 (2d Cir. 1996), the court divided equally on the question. *Id.* at 921-22, 934, 940. More recently, in *Muntaqim*, a panel held that Section 2 of the VRA did not apply to New York's felony disenfranchisement statute. 366 F.3d at 104. After this Court denied certiorari, 125 S. Ct. 480 (2004), the Second Circuit sua sponte granted en banc review of the panel decision, 396 F.3d 95 (2d Cir. 2004), and heard arguments on June 22, 2005.

The circuit courts' conflicting approaches create inconsistent levels of federal protection for the voting rights of racial minorities. Geography now determines whether criminal disenfranchisement laws, including permanent bans on voting by anyone convicted of a felony, may be challenged under the VRA. Of the four states that permanently disenfranchise all citizens convicted of felonies, two – Virginia and Kentucky – lie in circuits that treat Section 2 challenges to those laws as cognizable. *See Howard*, 2000 WL 203984 (App. 193a); *Wesley*, 791 F.2d 1255. But the Eleventh Circuit ruling below cuts off redress

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[6] The Fourth Circuit permits citation to unpublished opinions if "there is no published opinion that would serve as well . . . ." 4th Cir. R. 36(c).

under Section 2 of the VRA for the 613,000 Florida petitioners in this case, and the more than 148,000 citizens of Alabama, who have completed their sentences but remain barred indefinitely from the polls. Marc Mauer & Tushar Kansal, *Barred for Life: Voting Rights Restoration in Permanent Disenfranchisement States* 6 tbl. (2005), *at* http://www.sentencingproject.org/pdfs/barredforlife.pdf.

B. The Decision Below Rests on a Fundamental Misreading of the Constitution That Calls for this Court's Correction.

Though couched in terms of statutory interpretation, the Eleventh Circuit's refusal to apply Section 2 of the VRA to felony disenfranchisement laws rests on that court's judgment that such an application would potentially violate the Constitution. The en banc majority reasoned that applying Section 2 to Florida's law would create "a serious constitutional question by interpreting the Voting Rights Act to conflict with the text of the Fourteenth Amendment." *Johnson*, 405 F.3d at 1230 (App. 32a).

The Eleventh Circuit's conclusion that felony disenfranchisement is immune from challenge under Section 2 because it is expressly protected by the Constitution, *id.* at 1228-30 (App. 29a-34a), overstates this Court's reasoning in *Richardson v. Ramirez*, 418 U.S. 24 (1974), ignores the holding in *Hunter v. Underwood*, 471 U.S. 222 (1985), and allows the exemption of criminal disenfranchisement from the Penalty Clause of the Fourteenth Amendment to trump the Fifteenth Amendment's subsequently enacted and unqualified ban on race discrimination in voting.

In the Penalty Clause of the Fourteenth Amendment, the Reconstruction Congress recognized that former Confederate states might deny voting rights to freedmen and created a broad, structural penalty for such disenfranchisement. The Clause also created a limited exception to that penalty:

> [W]hen the right to vote . . . is denied to any of the male inhabitants of such State . . . or in any way abridged, *except for participation in rebellion, or other crime*, the basis of representation [in Congress] shall be reduced in the proportion which the number of such male citizens shall bear to the whole number of male citizens twenty-one years of age in such State.

U.S. Const. amend. XIV, § 2 (emphasis added).

In *Richardson*, this Court relied on the Penalty Clause's exemption of criminal disenfranchisement from the sanction of reduced representation in Congress to reject a nonracial, equal protection challenge to provisions of the California Constitution that permanently disenfranchised certain felons. 418 U.S. at 42-43. The Court reasoned that the framers of the Fourteenth Amendment "could not have intended to prohibit outright in [the Equal Protection Clause of] § 1 of that Amendment that which was expressly exempted from the lesser sanction of reduced representation imposed by § 2 of the Amendment." *Id.* at 43; *see also id.* at 55.

Yet when this Court faced a challenge to criminal disenfranchisement on the grounds that the provision was enacted in order to disqualify blacks from voting, it found the Penalty Clause exemption inapposite. *Hunter*, 471 U.S. at 233. In *Hunter*, the Court struck down Alabama's criminal disenfranchisement law, observing that the "implicit authorization of § 2 [of the Fourteenth Amendment] . . . was not designed to permit the purposeful racial discrimination attending the enactment and operation of [a law] which otherwise violates § 1 of the Fourteenth Amendment," and noting that nothing in *Richardson* is to the contrary. *Id.* Thus, *Hunter* stands for the proposition that criminal disenfranchisement laws do violate the Constitution when

enacted with the intent to deprive one racial group of its fundamental right to participate in the political process. *Id.*

Under *Hunter* and *Richardson*, then, felony disenfranchisement laws are not *per se* unconstitutional, but they are unconstitutional if they deliberately abridge the right to vote on account of race. *See Richardson*, 418 U.S. at 55; *Hunter*, 471 U.S. at 231-33. This interpretation is mirrored in Congress's exercise of its enforcement power through the VRA: felony disenfranchisement laws are not prohibited *per se* in Section 4 of the VRA, but may be evaluated on a case-by-case basis for their discriminatory effects under Section 2. *See* 42 U.S.C. §§ 1973, 1973b; *see also Johnson*, 405 F.3d at 1249 (Barkett, J., dissenting) (App. 78a) (criticizing the en banc majority for "overlook[ing] the distinction between felon disenfranchisement laws generally and the narrow subset of such laws that result in racial discrimination").

In addition to *Hunter*'s express recognition of a Fourteenth Amendment right to be free from racially discriminatory criminal disenfranchisement, the text, logic, and history of the Fifteenth Amendment undercut the Eleventh Circuit's approach. The Fifteenth Amendment makes no exception for criminal disenfranchisement. When disenfranchisement is intentionally racially discriminatory, the Fifteenth Amendment supersedes the earlier adopted Penalty Clause – replacing its structural penalty with an outright prohibition. There is thus no logical reason to assume that the Penalty Clause's race-neutral exemption from its general penalty was implicitly imported into the Fifteenth Amendment's prohibition against discrimination in voting based on race. Indeed, in crafting the Fifteenth Amendment, the Reconstruction Congress repeatedly considered exempting criminal disenfranchisement laws from the general ban on race discrimination in voting and rejected every such exception. *See, e.g.*, 67 H.R.J. 232-37 (1869); Cong. Globe, 40th Cong., 3d Sess. 724 (1869). The Eleventh

Circuit would nevertheless allow the exemption within the Fourteenth Amendment's Penalty Clause to immunize felony disenfranchisement laws from congressional enforcement of the Fifteenth Amendment's subsequent, specific, and exceptionless ban on race discrimination in voting.

Once it is clear – as it is from *Hunter* and an analysis of the text and history of the Fifteenth Amendment – that there is a constitutional right to be free of racially discriminatory felony disenfranchisement, nothing supports any special limit on Congress's remedial power. Congressional power under the enforcement clauses of the Reconstruction Amendments is strongest when protecting fundamental rights, *see, e.g.*, *Tennessee v. Lane*, 541 U.S. 509, 518 & n.4, 532 n.20 (2004), and when providing injunctive protection against state practices subject to heightened judicial scrutiny under the Equal Protection Clause, *see, e.g.*, *Nev. Dep't of Human Res. v. Hibbs*, 538 U.S. 721, 736, 738 (2003). Enforcement of the Fifteenth Amendment implicates both the most fundamental of all democratic rights – voting – and the paradigmatic "suspect class" – race. Unsurprisingly, then, Congress's enforcement power was at its zenith in enacting the VRA. *See Lane*, 541 U.S. at 518 n.4; *Hibbs*, 538 U.S. at 737-38; *Lopez v. Monterey County*, 525 U.S. 266, 282-85 (1999); *City of Boerne v. Flores*, 521 U.S. 507, 530 (1997).

The Eleventh Circuit majority stopped short of holding that Congress lacked the power to reach Florida's felony disenfranchisement law under Section 2 of the VRA. The court held instead that the "grave constitutional questions" raised by such an application compelled it to invoke the doctrine of constitutional avoidance. *Johnson*, 405 F.3d at 1229 (App. 32a). Because that doctrine depends on locating ambiguity in the statute, *Pa. Dep't of Corrs. v. Yeskey*, 524 U.S. 206, 212 (1998), the court sought and found ambiguity in the statutory phrase "on account of race or color," *Johnson*, 405 F.3d at 1229 n.30 (App. 31a-32a n.30). But

any uncertainty under subsection (a) about whether a particular voting qualification results in discrimination "on account of race or color" is resolved by subsection (b), which specifies that "[a] violation of subsection (a) . . . is established" by the totality of circumstances test, which is further illuminated in the accompanying Senate Report. 42 U.S.C. §§ 1973(a), (b); S. Rep. No. 97-417 (1982), *reprinted in* 1982 U.S.C.C.A.N. 177 *et seq.*; *Thornburg v. Gingles*, 478 U.S. 30, 43-45 (1986) (treating the Senate Report as controlling the analysis). The only remaining question then is how Florida's provision fares under the VRA's totality of the circumstances test, 42 U.S.C. § 1973(b), which is a factual determination for trial.

Similarly, the en banc court misapplied the clear statement rule. Although this rule also operates only when a statute is ambiguous, *Yeskey*, 524 U.S. at 209-12, which Section 2 of the VRA is not,[7] the Eleventh Circuit required "a clear statement from Congress that it intended [the] constitutionally-questionable result" of covering felony disenfranchisement, *Johnson*, 405 F.3d at 1232 (App. 37a-38a). Finding no clear statement, the court refused to apply Section 2 of the VRA to the Florida provision. *Id.* (App. 38a). By this logic, a VRA challenge would be barred even when a state had habitually violated the Constitution by using its felony disenfranchisement laws to discriminate intentionally against black voters.

In contrast to the Eleventh Circuit's convoluted constitutional analysis, the Ninth Circuit reasoned in a straightforward way, without resort to invented ambiguity. The court first observed that felony disenfranchisement laws are "voting qualification[s]" within the ambit of the Act's

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[7] *See Chisom v. Roemer*, 501 U.S. 380, 412 (1991) (Scalia, J., dissenting) ("[W]e tacitly rejected a 'plain statement' rule as applied to the unamended [VRA] § 2 in *City of Rome* . . . .").

ban on any "voting qualification . . . which results in a denial or abridgement of the right of any citizen of the United States to vote on account of race," 42 U.S.C. § 1973(a). *Farrakhan*, 338 F.3d at 1016. Because "Section 2 is clear that *any* voting qualification that denies citizens the right to vote in a discriminatory manner violates the VRA," *id.*, the Ninth Circuit reasoned that the plaintiffs' claim of vote denial was cognizable. The court saw no constitutional reason to look beyond the plain meaning of the statute or to create special exemptions for felony disenfranchisement. The Ninth Circuit recognized what this Court made clear in *Hunter*: "[S]tates cannot use felon disenfranchisement as a tool to discriminate on the basis of race." *Id.* (citing *Hunter*, 471 U.S. at 233). Regarding Congress's intentions, the court pointed to the breadth of Section 2's coverage, noting that "Congress specifically amended the VRA to ensure that, 'in the context of all the circumstances in the jurisdiction in question,' any disparate racial impact of facially neutral voting requirements did not result from racial discrimination." *Id.* (quoting the Senate Report and citing *Chisom*, 501 U.S. at 394 & n.21); *cf. In re England*, 375 F.3d 1169, 1179 (D.C. Cir. 2004) (acknowledging that the Supreme Court has repeatedly instructed that statutes written in broad language should be given broad application) (citations omitted), *cert. denied sub nom. Chaplaincy of Full Gospel Churches v. England*, 125 S. Ct. 1343 (2005).

Thus the Ninth Circuit expressly, and the Fourth and Sixth Circuits by implication, treat challenges to felony disenfranchisement laws under Section 2 of the VRA as they would challenges to any other voting qualification. Rather than requiring heightened evidence of legislative intent, they evaluate whether plaintiffs have properly alleged and can prove that in "the totality of circumstances," a challenged provision creates inequality in different racial groups' opportunities "to participate in the political process and to elect representatives of their choice." 42 U.S.C. § 1973(b).

C. This Case Is a Good Vehicle for Resolving the Question Presented.

This case comes to the Court on summary judgment with a factual record that includes strong evidence of the objective factors specified by the Senate as relevant to liability under Section 2 of the VRA.[8] The strong Senate-factor evidence is relevant to the question presented because Congress could not have intended to omit coverage of a voting qualification that interacts so strongly with the very factors Congress identified as typically creating Section 2 violations.

In this case, the record is so strong on the first Senate factor – historical discrimination in voting – and so weak on the last factor – the State's reasons for maintaining the policy – that petitioners have an independent claim of intentional race discrimination under the Fourteenth and Fifteenth Amendments. *See infra* Part II. In addition, petitioners presented evidence that the discriminatory impact of

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[8] The Senate Report that accompanied the 1982 amendments to Section 2 sets out a non-exhaustive list of factors relevant to a claim: "the history of voting-related discrimination in the State or political subdivision; the extent to which voting in the elections of the State or political subdivision is racially polarized; the extent to which the State or political subdivision has used voting practices or procedures that tend to enhance the opportunity for discrimination against the minority group . . . ; the exclusion of members of the minority group from candidate slating processes; the extent to which minority group members bear the effects of past discrimination in areas such as education, employment, and health, which hinder their ability to participate effectively in the political process; the use of overt or subtle racial appeals in political campaigns; and the extent to which members of the minority group have been elected to public office in the jurisdiction." *Gingles*, 478 U.S. at 44-45 (citing S. Rep. No. 97-417, at 28-29, *reprinted in* 1982 U.S.C.C.A.N. at 206-07). The Report also notes the probative value of evidence demonstrating that elected officials are unresponsive to the particular needs of the minority group and that the State has only tenuous reasons for maintaining the challenged policy. S. Rep. No. 97-417, at 29, *reprinted in* 1982 U.S.C.C.A.N. at 207.

Florida's felony disenfranchisement provision results in part from discrimination in another area – the criminal justice system, where racial disparities in felony convictions cannot be explained by higher rates of crime in the black community. *See* Chiricos Rep. (App. 310a). These disparities are aggravated by voting practices and procedures that tend to enhance the opportunity for racial discrimination. For example, the clemency process aggravates racial disparities by restoring voting rights to whites at higher rates than to blacks. *See* Uggen Rep. at 5-11 (App. 263a-70a); Uggen Supp. at 1-8 (App. 361a-73a). The process for purging the voter lists in 1998-2000 further aggravated these disparities. *See* Fla. Stat. ch. 98.0975 (repealed 2001); U.S. Comm'n on Civil Rights, Voting Irregularities in Florida During the 2000 Presidential Election, ch. 5 (2001), *available at* http://www.usccr.gov/pubs/vote2000/report/main.htm. In addition, elections in Florida are characterized by racially polarized voting, Uggen Rep. at 11-12,[9] and only rarely result in the election of black candidates, David A. Bositis, *Black Elected Officials: A Statistical Summary 2001*, at 16 tbl.3 (Joint Ctr. for Political & Econ. Studies 2003), *available at* http://www.jointcenter.org/publications1/publication-PDFs/BEO-pdfs/2001-BEO.pdf. *See Gingles*, 478 U.S. at 44-45.

Taking the evidence in the light most favorable to petitioners, as is required on summary judgment, Florida's felony disenfranchisement law is a voting qualification originally adopted as part of a multi-faceted scheme to disenfranchise African-Americans in a state whose history is replete with official race discrimination. The challenged provision continues to defeat black Floridians' electoral preferences today by disenfranchising them at twice the rate

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[9] *See also Solomon v. Liberty County*, 899 F.2d 1012, 1020-21 (11th Cir. 1990) (equally divided court) (Kravitch, J., concurring); *id.* at 1037 (equally divided court) (Tjoflat, C.J., concurring); *NAACP v. Gadsden County Sch. Bd.*, 691 F.2d 978, 982-83 (11th Cir. 1982).

of the rest of Florida's electorate. Uggen Rep. at 1, 22 (App. 256a, 296a-97a). In deciding whether challenges to felony disenfranchisement laws are cognizable under Section 2, this Court should have before it the kind of record this case presents, demonstrating the extent to which such laws may "interact[ ] with social and historical conditions to cause an inequality in the opportunities enjoyed by black and white voters to elect their preferred representatives," just as Congress anticipated. *Gingles*, 478 U.S. at 47.

II. The Court Should Grant the Petition to Make Clear That the State Bears the Burden of Proving a Legitimate Purpose for Reenacting a Provision Originally Enacted with Discriminatory Intent.

If there had been no 1968 reenactment of Florida's policy of permanent felony disenfranchisement, the outcome of this challenge would be clear. Because the 1868 provision was enacted to discriminate against black citizens and has continuously had that effect, it would be unconstitutional under *Hunter*, 471 U.S. 222. The Eleventh Circuit concluded, however, that because *petitioners* had not demonstrated *racist intent* behind the 1968 reenactment, their constitutional challenge evaporated. *Johnson*, 405 F.3d at 1223-26 (App. 17a-25a). The majority deviated from both this Court's precedents and its own in placing the evidentiary burdens on petitioners and insisting that they prove racist intent anew in 1968, despite the provision's tainted origin and continuing discriminatory impact.

Reenactments have caused widespread confusion concerning the allocation and description of the burdens of proof on the crucial issue of discriminatory purpose. The lower courts approach haphazardly and answer inconsistently the questions of who bears the burdens of production and persuasion, and what evidence is sufficient, to prove that a reenactment has cleansed a law tainted by an original

unconstitutional purpose. The confusion is not unique to felony disenfranchisement cases. It arises in cases involving elections systems, redistricting, education reform, and the establishment of religion. In view of the pervasiveness of the issue and the disarray in the lower courts, this Court should grant review in this case to articulate a clear evidentiary rule to govern challenges to the reenactment of policies once adopted for discriminatory reasons.

A. This Court Has Followed a Consistent Approach to Assessing the Constitutionality of the Reenactment of Policies Tainted by an Impermissible Purpose.

This Court has already developed and consistently employed two straightforward evidentiary devices capable of resolving the confusion in the lower courts: a shift in both the burdens of production and persuasion, and careful consideration of the evidence regarding the purpose for a law's reenactment. The Court's decisions reveal that: (1) a state reenacting a policy tainted by an impermissible purpose bears the burden of proving that legitimate reasons motivated the reenactment, thus purging any taint; and (2) the state may carry this burden only by producing credible and contemporaneous evidence showing that the primary reason for reenacting the policy was valid.

Almost thirty years ago, this Court explained that state policies adopted with a discriminatory purpose are unconstitutional. *See Washington v. Davis*, 426 U.S. 229, 239-42 (1976). Shortly afterwards, in two companion cases, the Court made clear that if an improper purpose is shown to be a substantial or motivating factor in a policy's adoption, the burden shifts to the state to prove by a preponderance of the evidence that "the same decision would have resulted even had the impermissible purpose not been considered." *Village of Arlington Heights v. Metro. Hous. Dev. Corp.*, 429

U.S. 252, 270 & n.21 (1977); *Mt. Healthy City Sch. Dist. Bd. of Educ. v. Doyle*, 429 U.S. 274, 287 (1977).

Then, in *Hunter*, this Court recognized that the taint of improper purpose persists through time. The Court held Alabama's criminal disenfranchisement provision – adopted with discriminatory intent and yielding continuous discriminatory impact – to be unconstitutionally tainted eighty-four years after its passage. *Hunter*, 471 U.S. at 233. The Court reserved the possibility that a reenactment of the policy for legitimate reasons might render it constitutional. *Id.* Given proof of initial improper intent and continuing discriminatory impact, however, the Court repeated that the burden shifts to the state to establish the tainted policy's legitimacy. *Id.* at 228.

In *United States v. Fordice*, 505 U.S. 717 (1992), this Court addressed for the first time a state's attempt to purge, through a subsequent reenactment, the taint of a policy originally enacted with unconstitutional intent. The case concerned several policies maintained by Mississippi's historically white universities. One such policy conditioned admission on minimum standardized test scores that were just under the average for white students but double the average for black students. *Id.* at 734. The state had adopted the standards for the purpose of excluding blacks after James Meredith was admitted to the University of Mississippi under court order. *See Ayers v. Allain*, 914 F.2d 676, 679-80 (5th Cir. 1990) (en banc), *vacated sub nom. United States v. Fordice*, 505 U.S. 717 (1992); *Meredith v. Fair*, 305 F.2d 343 (5th Cir. 1962). Three decades later, the policy continued to disqualify a disproportionate number of blacks from attending historically white universities. *Fordice*, 505 U.S. at 734. A class of black citizens sued under the Equal Protection Clause. Affirming the dismissal of their suit, the en banc Fifth Circuit focused not on the original intent of the policy in 1963, but instead on the state's intent in the mid-

1970s, when it readopted and amended the policy for the alleged purpose of addressing the under-preparation of incoming students. *Ayers*, 914 F.2d at 690. In the Fifth Circuit's view, the state's articulated reason for retaining the test standards in the 1970s purged their taint. *Id.*

This Court reversed, employing the evidentiary devices described above. All nine members of the Court recognized that because Mississippi's policies were "enacted originally to discriminate against black students," *Fordice*, 505 U.S. at 734, Mississippi bore the ultimate burden to prove proper justification for their readoption and continued implementation, *see id.* at 731, 739 (imposing on the state the burden to prove a clean break from prior intentional discrimination); *id.* at 744 (O'Connor, J., concurring) (same); *id.* at 746-47 (Thomas, J., concurring) (placing the burden to prove proper justification squarely on the state); *id.* at 758-59 (Scalia, J., concurring in the judgment in part and dissenting in part) (finding that in the face of policies once adopted with discriminatory intent, "the District Court should have required Mississippi to prove that its continued use of [standardized test] requirements does not have a racially exclusionary purpose and effect"). The Court was firm as well in its skeptical treatment of the state's asserted nondiscriminatory purpose. *See id.* at 734 (rejecting as a "midpassage justification" state evidence that test standards were maintained to address students' lack of preparedness for college); *id.* at 744 (O'Connor, J., concurring) ("[T]he courts below must carefully examine Mississippi's proffered justifications for maintaining a remnant of *de jure* segregation to ensure that such rationales do not merely mask the perpetuation of discriminatory practices.").

In his concurrence, Justice Thomas noted that the Court had, in effect, placed the burden of persuasion on the state:

> A challenged policy does not survive under the standard we announce today if it began during the prior *de jure* era, produces adverse impacts, and persists without sound educational justification. When each of these elements has been met, I believe, we are justified in not requiring proof of a present specific intent to discriminate. . . . And given an initially tainted policy, it is eminently reasonable to make the State bear the risk of nonpersuasion with respect to intent at some future time, both because the State has created the dispute through its own prior unlawful conduct, and because discriminatory intent does tend to persist through time. . . . Thus, if a policy remains in force, without adequate justification and despite tainted roots and segregative effect, it appears clear – clear enough to presume conclusively – that the State has failed to disprove discriminatory intent.

Id. at 746-47 (Thomas, J., concurring) (internal citations omitted). Justice Thomas thus explained the approach this Court has developed: given a policy initially tainted by and continuing to effectuate a state's discriminatory intent, the state bears the burden of persuading a factfinder that it had independent, legitimate reasons for retaining the policy at the time of its reenactment.

This Court most recently confronted the reenactment of a policy initially tainted by an impermissible purpose in *McCreary County v. ACLU of Kentucky*, 125 S. Ct. 2722 (2005). *McCreary County* involved three decisions by county governments to install a display honoring the Ten Commandments. The first two decisions were undertaken with the impermissible intent to advance religion. *Id.* at 2738-39. While refusing to find that these "past actions forever taint any effort" to reinstall a Ten Commandments display, *id.* at 2741, the *McCreary County* Court shifted the

burdens of production and persuasion to the counties to justify the final display, *see id.* at 2739-40 & n.18 (reviewing and rejecting counties' stated purposes, and noting that the counties had not demonstrably "cast off" the earlier improper objective). The Court also held that the secular purpose the government proffers "has to be genuine, not a sham," as well as "preeminent" or "primary," *id.* at 2735-36 (internal quotations omitted). And it viewed the evidence offered through the eyes of an "objective observer . . . presumed to be familiar with the history of the government's actions and competent to learn what history has to show." *Id.* at 2737.

The evidentiary standards applied in *Fordice* and *McCreary County* rest on unassailable legal principles. In the event of a reenactment of a tainted policy, the plaintiff has already carried the burdens of production and persuasion to prove the existence of a past unconstitutional motive, thereby establishing the taint. This proof overcomes the general presumption that government policies are constitutional. On the contrary, a tainted policy is unconstitutional, and it stays that way until the state wipes it clean. *See Hunter*, 471 U.S. at 233. Because it is the state's obligation to purge the taint, it only makes sense for the state to bear the evidentiary burdens in proving that it has done so. That is the logic of the burden shift imposed in *Arlington Heights*, 429 U.S. at 270 n.21, *Mt. Healthy*, 429 U.S. at 287, and *Hunter*, 471 U.S. at 228. *Fordice* and *McCreary County* add only that a reenactment, in itself, does not shift these burdens back to the plaintiff; a reenactment may indeed cure a policy's unconstitutionality, but the state must prove that it has done so. As to the content of this proof, government policies in general must be supported by a valid and rational purpose; so, too, must a reenactment. In proving that it retained or reenacted the policy for legitimate reasons, the state breaks the link with the policy's unconstitutional origin. Thus, the initial discriminatory purpose can no longer be viewed as a cause of the continuing discriminatory effects.

The instant case involves the intersection of two rights that demand the highest level of constitutional protection: the right to participate in the political process and to be free of race discrimination in doing so. Petitioners are entitled to enhanced evidentiary protections because the State has previously and purposefully infringed both rights.

B. The Lower Courts Are Not Following this Court's Approach, or Any Coherent Approach, in Assessing the Constitutionality of the Reenactment of Policies Tainted by an Impermissible Purpose.

Despite this Court's consistent application of these evidentiary rules, the lower courts are disregarding this precedent and reaching inconsistent results – in some cases, like this one, results at odds with this Court's decisions and inadequately protective of the constitutional rights at stake.

The Fourth Circuit recognized – and then avoided – the issue of the allocation of evidentiary burdens. In *Irby v. Virginia State Board of Elections*, 889 F.2d 1352 (4th Cir. 1989), the court confronted Virginia's decision to continue appointing rather than electing school board members. The appointive system was retained in 1901 – and reenacted in 1956 – in order to discriminate against black citizens. *Id.* at 1354. The policy was then reenacted on several subsequent occasions, with and without explanation. The Fourth Circuit declined to decide whether the finding of discriminatory intent in 1901 and 1956 "shifts to the defendants [the burden] to prove that the system is not currently being maintained for discriminatory purposes." *Id.* at 1355. Instead, the court assumed such a shift and held that the defendants had carried their burden. The *Irby* court expressed skepticism that the taint could be purged by a 1971 revision that made "dramatic (and racially progressive) changes [to its constitution] in other areas pertaining to education," but retained "the school

board selection provision . . . without change and with virtually no debate." *Id.* at 1356. Ultimately, however, the court held that the state defendants had "met their burden of rebutting the inference of discriminatory intent" by submitting evidence that the policy had been retained in 1984 on purely nondiscriminatory grounds. *Id.*

The Fifth Circuit's decisions reflect an unacknowledged internal conflict, first placing both evidentiary burdens as to legitimate intent on the challenger, and later reviewing with care the *state's* justification for a reenactment. In 1998, the Fifth Circuit held that, although Mississippi's criminal disenfranchisement provision was originally "motivated by a desire to discriminate against blacks," a reenactment "removed the discriminatory taint associated with the original version." *Cotton v. Fordice*, 157 F.3d 388, 391 (5th Cir. 1998). Because the plaintiff had not proved impermissible intent at the reenactment stage, the court saw no constitutional wrong. Two years later, however, the same court looked to the state's evidence of its motives in retaining a policy. *Chen v. City of Houston*, 206 F.3d 502 (5th Cir. 2000). When a redistricting plan allegedly adopted with racial motivation was later reenacted, the court inquired into "the state of mind of the reenacting body" and found that "the City had valid reasons to adhere to its prior borders distinct from the [purportedly tainted] grounds which led to their adoption." *Id.* at 520-21.

The Eleventh Circuit has changed its approach in the other direction, first placing both burdens of proof on the state and most recently, in this case, lifting the burdens from the state altogether and placing them on petitioners. In *Knight v. Alabama*, 14 F.3d 1534 (11th Cir. 1994), the Eleventh Circuit considered a challenge to Alabama's classification of its universities on racial lines, with more limited educational missions assigned to the historically black institutions. The plaintiffs there proved that this

system was traceable to *de jure* segregation. *Id.* at 1544. The court of appeals made clear that, under *Fordice*, "'the burden of proof [then] falls upon the *State*, and not the aggrieved plaintiffs,'" to establish a clear break from the prior unconstitutional policy. *Id.* at 1541 (quoting *Fordice*, 505 U.S. at 739 (alteration in original)). The court held that the state did not carry this burden by producing evidence of its reconsideration and reaffirmation of the classification system in 1974 and again in 1985, because the system remained, nevertheless, a "vestige of segregation," *id.* at 1542-45. *See Brown v. Bd. of Sch. Comm'rs*, 542 F. Supp. 1078, 1090 & n.11, 1105-06 (S.D. Ala. 1982) (invalidating Alabama's imposition of an at-large voting system motivated in 1876 by discriminatory intent and faulting the *state* for failing to show how a 1919 reenactment might have purged the taint), *aff'd*, 706 F.2d 1103 (11th Cir. 1983).

In contrast, the Eleventh Circuit's current rule allows a policy initially designed to advance an unconstitutional purpose to be cleansed if the state reenacts it through a multi-step process, with marginal textual modifications that leave the substance intact, and with complete silence as to its objective. *Johnson*, 405 F. 3d at 1220-22, 1224-25 (App. 11a-15a, 20a-23a). The court put petitioners to the task of proving a racist motive behind the reenactment in 1968, as if the law were newly minted and the hundred-year history of racial discrimination that produced it made no difference.

Such an unfair result is inconsistent with this Court's requirement that states show a definitive break with the racist origins of laws they decide to perpetuate despite their continuing discriminatory impact. Review by this Court is necessary to ensure, in this and an array of similar cases, that challenges to the reenactment of laws with odious origins and continuing discriminatory effects are resolved under the appropriate allocation and definition of the burdens of proof.

CONCLUSION

For these reasons, petitioners respectfully request that this Court grant this petition for a writ of certiorari to review the judgment of the Eleventh Circuit in this case.

Dated: Aug. 10, 2005

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No. 05-

IN THE

Supreme Court of the United States

THOMAS JOHNSON, *et al.*,

Petitioners,

v.

JEB BUSH, Governor of Florida, *et al.*,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

APPENDIX

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EN BANC OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT, DECIDED APRIL 12, 2005

UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

No. 02-14469

THOMAS JOHNSON, DERRICK ANDRE THOMAS, ERIC ROBINSON, ADAM HERNANDEZ, KATHRYN WILLIAMS-CARPENTER, JAU'DOHN HICKS, JOHN HANES, in their own right and as representatives of all ex-felon citizens of Florida,

Plaintiffs-Appellants,

OMALI YESHITELA,

Plaintiff,

v.

GOVERNOR OF THE STATE OF FLORIDA, JEB BUSH, Secretary of the State of Florida, KATHERINE HARRIS, CHARLIE CRIST, ROBERT MILLIGAN, WILLIAM NELSON, ROBERT CRAWFORD, THOMAS GALLAGHER, in their roles as members of the Clemency Board of Florida, BEVERLY HILL, Alachua County Election Supervisor, et al.,

Defendants-Appellees.

April 12, 2005, Decided
April 12, 2005, Filed

KRAVITCH, Circuit Judge:

I. Introduction

This case involves a Fourteenth Amendment Equal Protection Clause challenge and a Section 2 Voting Rights Act ("VRA") challenge to Florida's felon disenfranchisement law which provides that "[n]o person convicted of a felony . . . shall be qualified to vote or hold office until restoration of civil rights or removal of disability."[1] Fla. Const. art. VI,

1. The full text of the provision states:

> No person convicted of a felony, or adjudicated in this or any other state to be mentally incompetent, shall be qualified to vote or hold office until restoration of civil rights or removal of disability.

Fla. Const. art. VI, § 4 (1968).

A felon who has completed his sentence may apply for clemency to have his civil rights restored. Fla. Stat. § 940.05 (2003). The plaintiffs also allege that Florida's voting rights restoration scheme violates constitutional and statutory prohibitions against poll taxes. Access to the franchise cannot be made to depend on an individual's financial resources. *See Harper v. Va. State Bd. of Elections*, 383 U.S. 663, 668, 16 L.Ed. 2d 169, 86 S. Ct. 1079 (1966). Under Florida's Rules of Executive Clemency, however, the right to vote can still be granted to felons who cannot afford to pay restitution. The requirement of a hearing is insufficient to support the plaintiffs' claim. Because Florida does not deny access to the restoration of the franchise based on ability to pay, we affirm the district court's grant of summary judgment in favor of the defendants on these claims. In doing so, we say nothing about whether conditioning an application for clemency on paying restitution would be an invalid poll tax.

§ 4 (1968). The plaintiffs filed this class action on behalf of all Florida citizens who have been convicted of a felony and have completed all terms of their incarceration, probation, and parole but who are barred from voting under the state's felon disenfranchisement law.[2] The defendants are members of Florida's Clemency Board.[3]

II. Procedural History and Standard of Review

After cross motions for summary judgment, the district court granted summary judgment in favor of the defendants on all claims. A divided panel of this court reversed and remanded on both the Equal Protection and VRA claims. *Johnson v. Governor of State of Florida*, 353 F.3d 1287 (11th Cir. 2003), *vacated* 377 F.3d 1163. This court vacated the panel opinion and granted a rehearing en banc. *Johnson*, 377 F.3d at 1163-64. We now consider whether the district court erred in granting summary judgment in favor of the defendants on the plaintiffs' claims under the Equal Protection Clause of the Fourteenth Amendment and Section 2 of the Voting Rights Act.

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2. Approximately seventy percent of the plaintiffs' class is white.

3. The Clemency Board is made up of the Governor of Florida and members of the Cabinet. The Clemency Board has the power to restore the civil rights of convicted felons, including the right to vote. *See* Fla. R. Exec. Clemency. The suit also named Florida's county supervisors of elections. Their participation has been abated pending determination of liability.

We review a district court's grant of summary judgment de novo, "viewing the record and drawing all reasonable inferences in the light most favorable to the non-moving party." *Patton v. Triad Guar. Ins. Corp.*, 277 F.3d 1294, 1296 (11th Cir. 2002). Summary judgment is appropriate when "there is no genuine issue as to any material fact and . . . the moving party is entitled to a judgment as a matter of law." Fed.R.Civ.P. 56(c).

III. The Equal Protection Claim

The plaintiffs argue that Florida's felon disenfranchisement law violates the Equal Protection Clause, which prohibits a state from "deny[ing] to any person within its jurisdiction the equal protection of the laws." U.S. Const. amend. XIV, § 1. The plaintiffs contend that racial animus motivated the adoption of Florida's criminal disenfranchisement provision in 1868 and this animus remains legally operative today, notwithstanding the fact that Florida altered and reenacted the provision in 1968.

A state's decision to permanently disenfranchise convicted felons does not, in itself, constitute an Equal Protection violation. *Richardson v. Ramirez*, 418 U.S. 24, 53-55, 94 S. Ct. 2655, 41 L.Ed.2d 551 (1974). The Supreme Court made this clear in *Richardson*, where it rejected a non-racial equal protection clause challenge to California's felon disenfranchisement law. 418 U.S. at 56, 94 S. Ct. 2655. In doing so, the Court relied on Section 2 of the Fourteenth Amendment, holding that it expressly permits states to

disenfranchise convicted felons.[4] The Court was persuaded that:

> [T]hose who framed and adopted the Fourteenth Amendment could not have intended to prohibit outright in § 1 of that Amendment that which was expressly exempted from the lesser sanction of reduced representation imposed by § 2 of the Amendment.

Id. at 43. Of course, the Equal Protection Clause prohibits a state from using a facially neutral law to *intentionally* discriminate on the basis of race. *Washington v. Davis*, 426 U.S. 229, 239-40, 48 L.Ed.2d 597, 96 S.Ct. 2040 (1976). This includes a criminal disenfranchisement law enacted with

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4. The full text of Section 2 states:

> Representatives shall be apportioned among the several States according to their respective numbers, counting the whole number of persons in each State, excluding Indians not taxed. But when the right to vote at any election for the choice of electors for President and Vice President of the United States, Representatives in Congress, the Executive and Judicial officers of a State, or the members of the Legislature thereof, is denied to any of the male inhabitants of such State, being twenty-one years of age, and citizens of the United States, or in any way abridged, except for participation in rebellion, or other crime, the basis of representation therein shall be reduced in proportion which the number of such male citizens shall bear to the whole number of male citizens twenty-one years of age in such State. U.S. CONST. amend. XIV, § 2.

the intent to deprive one racial group of its right to participate in the political process. *Hunter v. Underwood*, 471 U.S. 222, 233, 85 L.Ed.2d 222, 105 S.Ct. 1916 (1985). In light of this well-established precedent, the question here is whether the plaintiffs have alleged facts that, if true, would be sufficient to establish intentional discrimination in Florida's *current* disenfranchisement law.

1. Historical Background

Florida's policy of criminal disenfranchisement has a long history, tracing back well before the Civil War.[5] Florida's earliest Constitution, adopted in 1838, authorized the General Assembly to enact criminal disenfranchisement laws and in 1845, Florida's General Assembly enacted such a law.[6] Florida's 1861 and 1865

5. Indeed, throughout history, criminal disenfranchisement provisions have existed as a punitive device. *See* Harvard Law Review Association, *One Person, No Vote: The Laws of Felon Disenfranchisement*, 115 Harv. L. Rev. 1939, 1939-42 (2002). When the *Fourteenth Amendment* was ratified, twenty-nine of thirty-six states had some form of criminal disenfranchisement law. *See Richardson*, 418 U.S. at 48. Today, forty-eight states have some form of criminal disenfranchisement provision. Although Florida's felon disenfranchisement law may be among the most restrictive, Florida hardly stands alone in its long-standing use of these laws.

6. The 1838 Constitution provided that "[t]he general assembly shall have power to exclude from . . . the right of suffrage, all persons convicted of bribery, perjury, or other infamous crime." Fla. Const. art VI, § 4 (1838).

The 1845 provision stated:

> *Be it further enacted*, That every person who shall become a candidate for any of the foregoing offices, shall possess

(Cont'd)

Constitutions also contained criminal disenfranchisement provisions.

There is no doubt that Florida's decision to adopt a criminal disenfranchisement law in these early Constitutions was based on a non-racial rationale. At that time, the right to vote was not extended to African-Americans, and, therefore, they could not have been the targets of any disenfranchisement law. The plaintiffs, however, point to *1868* as the critical date on which they allege Florida's disenfranchisement law became motivated by racial discrimination.

Because the plaintiffs' Equal Protection claim hinges on the 1868 criminal disenfranchisement provision, we must examine the historical context in which that provision was adopted. After the Civil War, the Reconstruction Act required Florida to ratify the Fourteenth Amendment and change its Constitution as a condition for readmittance to the Union.[7] In accordance with a *federally mandated* plan, the South was divided into military districts with Florida under the command of General John Pope. Under his supervision, both

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(Cont'd)

> the same qualification as that prescribed for a voter, before he shall be eligible to that office. And no person who shall hereafter be convicted of bribery, perjury, or other infamous crime, shall be entitled to the right of suffrage.

1845 Fla. Laws. Ch. 38, art. 2 § 3.

7. In *Richardson*, the Court briefly explained the process of how the southern states gained readmission to the Union following the Civil War. 418 U.S. at 48-52. The Court observed that many of the new *congressionally approved* state constitutions contained felon disenfranchisement provisions. *Id.*

African-Americans and white delegates were elected to Florida's 1868 constitutional convention.

During the convention, a struggle for control erupted between the Radical Republicans and the Moderate Republicans. The Radical Republicans "wished to exclude native whites from state politics" and the Moderate Republicans were "opposed to the Radicals and willing to compromise with native whites." After a series of events unfolded, the Radical Republicans and Moderate Republicans each had drafted competing constitutions and both groups claimed to be the lawful convention. The Federal government supervised the process. Faced with a choice between the two constitutions, the United States Congress endorsed the Constitution drafted by the Moderate Republicans. It was subsequently ratified by the voters of Florida. Like Florida's earlier Constitutions, the 1868 Constitution contained a criminal disenfranchisement provision.[8] Thus, under federal supervision, a racially mixed delegation produced a constitution granting suffrage to men of all races.

We do not doubt that racial discrimination may have motivated certain other provisions in Florida's 1868 Constitution such as a legislative apportionment scheme that diminished representation from densely populated black counties. The existence of racial discrimination behind some provisions of Florida's 1868 Constitution does not, however, establish that racial animus motivated the criminal disenfranchisement provision, particularly given Florida's long-standing tradition of criminal disenfranchisement.

8. Notably, five African-American delegates at the convention explicitly voted for the 1868 criminal disenfranchisement provision.

Indeed, the plaintiffs' own historical expert conceded that prior to the instant case, no historian who had studied Florida's 1868 Constitution had ever contemplated that the 1868 criminal disenfranchisement provision was enacted with discriminatory intent.

The plaintiffs offer no contemporaneous evidence from the 1868 constitutional convention demonstrating that racial discrimination motivated the enactment of the 1868 disenfranchisement provision. To advance their theory, the plaintiffs rely almost exclusively[9] on a few isolated remarks[10] made *after* the 1868 Constitutional Convention. Although

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9. As further evidence of racial discrimination, the plaintiffs argue that the 1868 criminal disenfranchisement provision expanded the category of crimes by reaching all felonies. However, the plaintiffs conceded below that the term "infamous crimes" used in Florida's 1838 disenfranchisement provision was understood at common law to include all felonies. The use of the word "felony" in the 1868 Constitution merely reflected the language that was used in the Reconstruction Act which required the states to grant suffrage to all male citizens, twenty-one years and older "*except such as may be disenfranchised for participation in the rebellion or for felony at common law.*" Act of Mar. 2, 1867, ch. 153, 14 Stat. 428. § 5 (emphasis in original).

10. For example, the plaintiffs cite to the fact that one of the Moderate Republican leaders stated in 1872 that he had kept Florida from becoming "niggerized." A review of the record suggests that this post-convention comment and others cited by the plaintiffs were likely made in reference to the legislative apportionment formula and a provision that circumvented local elections by requiring the governor to appoint county officials. The plaintiffs' own expert conceded that felon disenfranchisement was a relatively minor issue during the 1868 Convention.

these comments reflect an unfortunate and indefensible racial animus in nineteenth-century Florida politics, there is no evidence that these post-convention comments referenced the 1868 disenfranchisement provision. Indeed, the record strongly indicates that these comments referenced other provisions in the 1868 Constitution, such as the legislative apportionment system.[11] In addition, the plaintiffs point to the fact that Florida rejected the Radical Republican Constitution which did not contain a disenfranchisement provision in favor of the Moderate Republican Constitution which contained such a provision. Although this is true, it in no way establishes that racial discrimination motivated the disenfranchisement provision. There is no evidence to suggest that Florida's decision to adopt the Moderate Republican Constitution had anything to do with the disenfranchisement provision.[12] Furthermore, Florida did not act alone in choosing its Constitution—the United States Congress expressly approved Florida's 1868 Constitution in readmitting the state to the Union.

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11. The only comment possibly referencing the felon disenfranchisement provision was made in 1881. But it is not clear whether this comment specifically referred to the adoption of the disenfranchisement provision in 1868. Moreover, we question the reliability of a single comment made *thirteen years* after the Convention.

12. In fact, the record indicates that the reason the Moderate Republican Constitution was chosen was because it was signed by a clear majority of the delegates at the convention.

2. 1968 Constitutional Revision

One hundred years after the adoption of the 1868 Constitution, Florida comprehensively revised its Constitution. Once again, Florida chose to maintain a criminal disenfranchisement law, a decision explicitly left to its discretion by the text of the Fourteenth Amendment. The plaintiffs do not allege that racial discrimination motivated the adoption of Florida's 1968 felon disenfranchisement law.

The backdrop for the enactment of Florida's 1968 felon disenfranchisement provision is as follows. In 1965, the Florida Legislature appointed a thirty-seven member Constitutional Revision Commission ("CRC") to engage in "a careful study of the constitution . . . for the purpose of eliminating obsolete, conflicting and unnecessary provisions as well as for framing an orderly and properly arranged constitution, based upon economic and social changes." 1965 Fla. Laws, ch. 65-651. To engage in this process, the CRC delegated responsibilities to various committees. The Suffrage and Elections Committee was charged with, *inter alia*, examining Florida's felon disenfranchisement provision.

The plaintiffs contend that any revisions made in 1968 to Florida's felon disenfranchisement law were not substantive in nature.[13] We disagree. Florida's 1968 felon disenfranchisement

13. To support this argument, the plaintiffs offer incomplete statements from a hodgepodge of legislative materials that were not before the district court at summary judgment. Even if we were to (Cont'd)

provision is markedly different from Florida's 1868 version. The 1868 Constitution (as amended in 1885) contained two provisions for criminal disenfranchisement.

Section 4 provided:

> No person under guardianship, *non compos mentis*, or insane, shall be qualified to vote at any election, nor shall any person convicted of felony by a court of record be qualified to vote at any election unless restored to civil rights.

Fla. Const. art. VI, § 4 (1885). Section 5 provided:

> The Legislature shall have the power to, and shall, enact the necessary laws to exclude . . . from the right of suffrage, all persons convicted of bribery, perjury, larceny, or other infamous crime . . .

Fla. Const. art. VI, § 5 (1885). After the 1968 revision, only one provision addressed felon disenfranchisement:

> No person convicted of a felony, or adjudicated in this or any state to be mentally incompetent, shall be qualified to vote or hold office until restoration of civil rights or removal of disability.

Fla. Const. art. VI, § 4 (1968).

(Cont'd)

take judicial notice of all of these records, these materials would not help the plaintiffs. The plaintiffs also argue that the district court erred in excluding Richard Scher's expert report on the 1968 constitutional revision. We review evidentiary rulings for abuse of discretion, *United States v. Smith*, 231 F.3d 800, 807 (11th Cir. 2000), and conclude that the district court did not abuse its discretion. Even if admissible, Scher's report would not help the plaintiffs.

Whereas the 1868 provisions disenfranchised persons convicted of certain misdemeanors such as petty larceny,[14] under the new 1968 provision, only those persons convicted of felonies could be disenfranchised. Therefore, the 1968 provision narrowed the class of persons who could be disenfranchised and re-enfranchised some persons who previously were disenfranchised.[15]

Additionally, before submitting its proposal to the CRC, the Suffrage and Elections Committee considered several motions to alter the newly proposed felon disenfranchisement provision.[16] Notably, the committee considered but rejected

14. According to the Florida Supreme Court, persons convicted of offenses enumerated in Section 5 of the 1868 disenfranchisement provision, including a misdemeanor such as "petty larceny" were disenfranchised. *State ex. rel. Jordan v. Buckman*, 18 Fla. 267, 270 (1881).

15. The plaintiffs focus on what they call the "automatic felony disenfranchisement provision" and assert that it remained unaffected by the 1968 revision. Presumably, the plaintiffs are referring to Section 4 of the 1868 provision. The plaintiffs' argument is misleading. Section 5 of the 1868 provision was also an "automatic disenfranchisement" provision because it *required* the legislature to enact disenfranchisement laws. In deleting Section 5 in 1968, the legislature did engage in a revision of what the plaintiffs call "automatic disenfranchisement." Therefore, the "automatic disenfranchisement provision" (which encompassed both sections 4 and 5 in the 1868 provision) was revised in 1968.

16. The committee minutes state:

> Mr. Earle moved that Article VI, Section 4 be adopted by the Committee on Suffrage and Elections. The motion

(Cont'd)

an amendment which would have ended blanket disenfranchisement of felons and instead would have vested the legislature with the power to impose criminal disenfranchisement. The committee also considered and rejected an amendment to limit felon disenfranchisement to

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(Cont'd)

was seconded. Mr. Pettigrew moved to amend Mr. Earle's motion by striking "judicially determined to be of unsound mind, or under judicial guardianship because of mental disability" and to substitute therefor "persons adjudicated mentally incompetent." This motion was seconded and passed. Mr. Pettigrew moved to further amend Section 4 by adding to his previous amendment: "in this or any other state and who have not had their competency judicially restored." This amendment was seconded and also passed. After considerable discussion, Mr. Pettigrew moved that Section 4 be deleted and the following inserted: "The Legislature may by law establish disqualifications for voting for mental incompetency or conviction of a felony." The motion was seconded. Mr. Goodrich offered the following substitute motion to Mr. Pettigrew's motion: Delete Section 4 and insert: "The Legislature may by law exclude persons from voting because of mental incompetence or commitment to a jail or penal institution." After discussion, Mr. Goodrich's motion failed for lack of a second. The vote was taken on Mr. Pettigrew's motion, but it failed of adoption. Mr. Goodrich moved that the word "felony" in line 2 of *Section 4* be changed to "crime." The motion failed for lack of a second. The Committee adopted Section 4 of Article VI with no further amendments.

Minutes of the Suffrage and Elections Committee of the Florida Constitution Revision Commission, Feb. 2-3, 1966, at 6-7.

those still in prison. Had the committee only been engaged in stylistic revisions, as the plaintiffs urge was the case, it would not have considered or debated these alternatives.

The committee's final proposal then was sent to the CRC. The CRC met to review the changes to the Constitution and submitted a draft to the legislature. The legislature approved the proposed new Constitution containing the disenfranchisement provision; it then was affirmed by the voters of Florida. Thus, Florida's 1968 Constitution, including the felon disenfranchisement provision, was adopted after four stages of review.

3. Equal Protection Analysis

A facially-neutral law violates the Equal Protection Clause if adopted with the intent to discriminate against a racial group.[17]

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17. Proof of intentional discrimination is required under the Equal Protection Clause. One factor relevant to the intent inquiry is whether the law being challenged has an impact that bears more heavily on one race than another. *See Village of Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252, 266, 50 L.Ed.2d 450, 97 S.Ct. 555 (1977). Here, Florida's felon disenfranchisement provision did not create a significant disparate impact along racial lines in 1968. Accepting the plaintiffs' estimates for 1968 as true, the felon disenfranchisement provision denied voting rights to far more whites than African-Americans and decreased the percentage of African-American voters state-wide by less than one quarter of one percent. The plaintiffs' best estimates show that 44,362 white voters and 16,150 black voters were disenfranchised in 1968 due to a felony conviction. Although proportionately more African-American voters were affected, the percentage of eligible African-American voters

(Cont'd)

Washington v. Davis, 426 U.S. at 239. In *Hunter v. Underwood*, the Supreme Court examined head-on an equal protection challenge to a criminal disenfranchisement provision. 471 U.S. at 223. There, the Court determined that Alabama's criminal disenfranchisement provision violated the Equal Protection Clause because it was adopted in 1901 to minimize the political power of its African-American population. *Id.* at 228-230.[18] After the 1901 enactment, the Alabama legislature neither altered the provision nor reenacted it in a political atmosphere free of racial bias. Rather, all of the amendments to the provision were the result of judicial action. *Id.* at 233.

The *Hunter* Court articulated a two-step test to analyze whether a criminal disenfranchisement provision violates the Equal Protection Clause. *Id.* at 227-28. The Court directed as follows:

> Presented with a neutral state law that produces disproportionate effects along racial lines, the

(Cont'd)

in the voting age public dropped only from 12.57% in 1967 to 12.32% in 1968. The plaintiffs focus on the *present* racially disparate impact of the felon disenfranchisement provision, but this amount of disparate impact was not present in 1968 when the provision was enacted. Although disturbing, the *present* racially disparate impact of the felon disenfranchisement law does not guide our analysis.

18. Unlike the case at bar, in *Hunter*, there was extensive evidence that racial animus motivated the 1901 disenfranchisement provision. Alabama did not contest this fact. Indeed, at oral argument Alabama's counsel conceded that "I would be very blind and naive [to] try to come up and stand before this Court and say that race was not a factor in the enactment of Section 182; that race did not play a part in the decisions of those people who were at the constitutional convention of 1901 and I won't do that." *Id.* at 230.

> Court of Appeals was correct in applying the approach of *Arlington Heights* to determine whether the law violates the Equal Protection Clause of the Fourteenth Amendment: "[O]fficial action will not be held unconstitutional solely because it results in a racially disproportionate impact . . . Proof of racially discriminatory intent or purpose is required to show a violation of the Equal Protection Clause." Once racial discrimination is shown to have been a "substantial" or "motivating" factor behind enactment of the law, the burden shifts to the law's defenders to demonstrate that the law would have been enacted without this factor.

Id. (citation omitted).

Thus, under the *Hunter* analysis, we first examine whether racial discrimination was a substantial or motivating factor in the state's decision to deny the right to vote to felons. If there is evidence that racial discrimination was a motivating factor, we then ask whether the state can show that the provision would have been enacted in the absence of any racially discriminatory motive.

a. Applying *Hunter v. Underwood*

The essence of the plaintiffs' Equal Protection claim is that racial animus motivated the adoption of Florida's disenfranchisement law in 1868 and this animus remains legally operative today despite the re-enactment in 1968. As suggested earlier, we question whether the plaintiffs have adequately demonstrated that racial discrimination motivated

the adoption of the 1868 provision. The plaintiffs introduced no contemporaneous evidence showing that racial discrimination motivated the adoption of the 1868 provision. Nevertheless, because of the procedural posture of this case, we are mindful of the need to view the evidence in the light most favorable to the plaintiffs. Thus, we will assume, without deciding, that racial animus motivated the adoption of Florida's 1868 disenfranchisement law. That assumption does not, however, lead us to conclude that the plaintiffs satisfy the first step of *Hunter*. Importantly, we are concerned here with the validity of the *1968 provision*, not the 1868 provision and the plaintiffs concede that the 1968 provision was not enacted with discriminatory intent.[19]

In *Hunter*, the Supreme Court left open the precise question we confront here: whether a subsequent legislative re-enactment can eliminate the taint from a law that was originally enacted with discriminatory intent.[20] *Hunter*, 471 U.S. at 233. In *Cotton v. Fordice*, 157 F.3d 388 (5th Cir. 1998), the Fifth Circuit recognized that this issue was left open by *Hunter* and held that

19. There is no allegation in the plaintiffs' complaint that the 1968 provision was adopted with the intent to discriminate based on race. Indeed, the plaintiffs stipulated that there is no evidence that legislators in 1968 were concerned with or considered the consequences of the policy along racial lines.

20. The Supreme Court concluded that revision to the provision by *state courts*, which severed "some of the more blatantly discriminatory" portions of the law, did not purge the provision of its *legislative* intent. *Hunter*, 471 U.S. at 232-33. The Supreme Court, however, did not hold that intervening *legislative* changes to the policy would have been legally insufficient to remove an earlier discriminatory intent.

the facially neutral disenfranchisement provision in that case overcame its "odious origin" through legislative amendments. 157 F.3d at 391. The Fifth Circuit pointed out that the disenfranchisement provision at issue was originally enacted in 1890 with discriminatory intent, but was amended by the legislature in 1950 to remove burglary as a disenfranchising crime, and was amended in 1968 to add murder and rape as disenfranchising crimes, two crimes which were historically excluded because they were not considered "black" crimes. *Id.* The court emphasized the deliberative process through which the provision had twice been amended: First, both houses of the legislature had to pass the amendment by a two-thirds vote; then the Mississippi Secretary of State had to publish the full text of the provision at least two weeks before the popular election; finally, a majority of the voters had to approve the full text of the provision. *Id.* Thus, the Fifth Circuit held that "[b]ecause Mississippi's procedure resulted both in 1950 and in 1968 in a re-enactment of [the provision], each amendment superseded the previous provision and removed the discriminatory taint associated with the original version." *Id.*

The situation here is similar to that in *Cotton v. Fordice.* Like Mississippi's provision, Florida's disenfranchisement provision was amended through a deliberative process in 1968. The 1968 provision narrowed the class of disenfranchised individuals to those convicted of felonies. Moreover, the provision first was considered by the Suffrage and Elections Committee. The Committee sent its final proposal to the CRC. The CRC reviewed the changes to the Constitution and sent a draft to the legislature, which approved the new Constitution. Finally, the voters approved the new Constitution. Thus, as in *Cotton v. Fordice*, Florida's

1968 re-enactment eliminated any taint from the allegedly discriminatory 1868 provision, particularly in light of the passage of time and the fact that, at the time of the 1968 enactment, no one had ever alleged that the 1868 provision was motivated by racial animus.

Even if the plaintiffs were somehow able to satisfy the first step of *Hunter*, their Equal Protection claim would still fail. Under the second step of *Hunter*, we examine whether Florida would have chosen to disenfranchise felons in 1968 if legislators did not have a discriminatory motive. In *Hunter*, this was a more complicated analysis because it required a counter-factual scenario: given that Alabama only legislatively addressed the disenfranchisement issue once, what would legislators have done if they did not have a discriminatory motive? 471 U.S. at 228-29. Here, we have the luxury of not having to delve into a complex counter-factual scenario because Florida simplified the analysis by returning to the issue in 1968. Florida's 1968 Constitution permits us to determine whether the state would have chosen to disenfranchise felons if the impermissible motive was absent. The results are plain: there is no allegation of racial discrimination in 1968 and the legislators decided to include a felon disenfranchisement provision in the revised constitution after consideration by both the CRC and the Suffrage and Elections Committee. This decision was then affirmed by both houses of the legislature and by the voters of Florida.

Thus, Florida's felon disenfranchisement provision is not a violation of the Equal Protection Clause under the standard the Court adopted in *Hunter*. Florida's re-enactment of the

felon disenfranchisement provision in the 1968 Constitution conclusively demonstrates that the state would enact this provision even without an impermissible motive and did enact the provision without an impermissible motive. The state has met its burden as a matter of law by substantively re-enacting the law for race-neutral reasons.

The plaintiffs urge that the defendants should bear a greater burden. They contend that Florida must affirmatively prove that racial discrimination was not a substantial or motivating factor behind the disenfranchisement law in 1968. Specifically, the plaintiffs argue that Florida must demonstrate that it acknowledged that racial discrimination tainted the 1868 provision, and yet it knowingly reenacted the disenfranchisement provision for non-discriminatory reasons in 1968. We do not require this level of proof.[21] Florida's felon disenfranchisement provision is constitutional because it was substantively altered and reenacted in 1968 in the absence of any evidence of racial bias. *Cotton v. Fordice*, 157 F.3d 388 (5th Cir. 1998).

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21. Prior to this case, no expert had ever suggested that the 1868 disenfranchisement provision was motivated by racial discrimination. The plaintiffs' standard establishes an insurmountable burden. As the defendants point out, if the court were to accept the plaintiffs' standard, then the more dubious an allegation of past discrimination in a predecessor provision, the more difficult it becomes for a state to extinguish it because it would be unlikely that the present day legislators would be aware of the past discrimination. The result would be to reverse the presumption that a State's laws are constitutional, and plunge federal courts into far-reaching expeditions regarding the sins of the past in order to question the laws of today.

The plaintiffs rely extensively on *United States v. Fordice*, 505 U.S. 717, 120 L.Ed.2d 575, 112 S.Ct. 2727 (1992) to support their argument. *Fordice*, however, dealt with a challenge to Mississippi's system of higher education and involved an extreme case of recent state discrimination. Mississippi had actively resisted removing the segregated system of education in the 1960s, failed to fund even limited educational reform in 1969, and was sued by the United States and private plaintiffs in 1975 for failing to comply with the Equal Protection Clause.[22] *Id.* at 722-25. The issue in *Fordice* was whether the state's facially-neutral education system, adopted only after the state was required to integrate its schools by court order, was valid under the Equal Protection Clause if the system maintained the racially disparate impact that *de jure* segregation had created. The Supreme Court found that Mississippi's actions were not consistent with the Equal Protection Clause because Mississippi made no effort to remove the discriminatory effects of *de jure* segregation.

The present case and *Fordice* are not analogous. First, Florida has a valid public policy reason for disenfranchising felons, where Mississippi did not have a sound justification for its education policies. Justice Thomas, in his concurring opinion in *Fordice*, specifically stated that heightened review is only applicable when there is no sound public policy justification for the state law, stating: "A challenged policy does not survive under the standard we announce today if it began during the prior *de jure* era, produces adverse impacts,

22. In *Fordice*, the question was one of what remedy the Constitution requires after a State has already been found liable for violating the Constitution via *de jure* segregation. By contrast, here the question is one of liability, not remedy.

and persists without sound educational justification." *Fordice*, 505 U.S. at 746. Unlike Mississippi, which did not have a valid educational justification for maintaining segregated schools, Florida has a legitimate reason for denying the vote to felons. Several courts have recognized the propriety of excluding felons from the franchise. *See Richardson*, 418 U.S. at 54-55; *Green v. Board of Elections*, 380 F.2d 445, 450-52 (2d Cir. 1967); *Beacham v. Braterman*, 300 F.Supp. 182, 184 (S.D.Fla.), *aff'd*, 396 U.S. 12, 90 S.Ct. 153, 24 L.Ed.2d 11 (1969).

Second, the current Florida provision was passed one hundred years after the alleged intentional discrimination occurred, whereas Mississippi's provision was passed shortly after the end of *de jure* segregation in education. Needless to say, the Florida legislators who passed the 1868 Constitution and the 1968 Constitution were not the same people. In *Fordice*, however, the legislators who refused to desegregate the Mississippi schools without a court order in the 1960s, most likely overlapped significantly with the legislators who passed the facially neutral education system in the 1970s. Given the proximity in time between Mississippi's intentional discrimination and the facially neutral provision in education, the Court had a healthy skepticism that the facially neutral provision was indeed neutral. Certainly, the Mississippi legislators who voted for the facially neutral provision understood the history of racial segregation in education and the likely effect of their new education system. But this skepticism does not apply here, because it is not reasonable to assign any impermissible motives held by the 1868 Florida legislators to the 1968 legislators who voted for the present felon disenfranchisement provision.

Third, Florida's 1968 felon disenfranchisement provision did not continue the adverse disparate impact of earlier *de jure* measures, which makes the present case entirely different than the situation in *Fordice*. At the time the Mississippi legislature adopted its education system, the system of higher education was almost completely racially segregated. 505 U.S. at 722-23. In *Fordice*, therefore, the Supreme Court was concerned that Mississippi was attempting to perpetuate its racially segregated education system, established in a time of *de jure* segregation, through a facially-neutral provision. Conversely, when Florida adopted its felon disenfranchisement provision in 1968, the racial effects of the provision were minor.[23] In 1968, Florida legislators and voters were not attempting to extend the effects of *de jure* discrimination with a facially-neutral provision because there was little adverse impact to extend by passing the felon disenfranchisement provision.[24] Florida's provision simply did not maintain a pattern of discrimination the way Mississippi's provision did. Consequently, the heightened review in *Fordice* is not appropriate here.

Finally, we note that this circuit has been reluctant to extend the education line of cases to other areas. As this court

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23. According to the plaintiffs' estimates, in 1968, 3.13% of voting age African-Americans were disenfranchised due to a felony conviction as compared to 1.24% of non African-Americans.

24. In contrast to school desegregation where the racially disparate impact was at its height in the 1950s and 1960s and has decreased since, the felon disenfranchisement rule had very little racially disparate impact in the 1960s and only developed such an effect many years later.

stated in *Burton v. City of Belle Glade*, school desegregation jurisprudence is unique and difficult to apply in other contexts. 178 F.3d 1175, 1190 (11th Cir. 1999); *see also Johnson v. DeSoto County Bd. of Comm'rs*, 204 F.3d 1335, 1344 n.18 (11th Cir. 2000). Moreover, as discussed earlier, there is specific precedent from this court and the Supreme Court dealing with criminal disenfranchisement. *See Hunter v. Underwood*, 471 U.S. 222, 105 S.Ct. 1916, 85 L. Ed. 2d 222 (1985); *Richardson v. Ramirez*, 418 U.S. 24, 94 S.Ct. 2655, 41 L.Ed.2d 551 (1974); *Beacham v. Braterman*, 300 F.Supp. 182, 183 (1969), *aff'd* 396 U.S. 12, 90 S.Ct. 153, 24 L. Ed. 2d 11 (1969) (finding by a three judge panel that Florida's decision to disenfranchise felons was not a violation of the plaintiff's equal protection or due process rights). Because these cases establish clear standards by which to judge state action, we are bound by precedent and need not go into other areas of possibly analogous law.

For the above reasons, we affirm the district court's grant of summary judgment on this claim.

IV. The Voting Rights Act Claim

The plaintiffs also argue that Florida's felon disenfranchisement law violates Section 2 of the Voting Rights Act. As a threshold matter, this claim raises an important question of statutory interpretation, namely, whether Section 2 of the Voting Rights Act applies to Florida's felon disenfranchisement provision. The Circuits are split on this issue. *Compare Muntaqim v. Coombe*, 366 F.3d 102, 124 (2d Cir. 2004) (holding that Section 2 did not reach New York's felon disenfranchisement statute),

cert. denied, 160 L. Ed. 2d 356, 125 S. Ct. 480 (2004), *and reh'g en banc granted*, 396 F.3d 95 (2004) *with Farrakhan v. Washington*, 338 F.3d 1009, 1014-15 (9th Cir. 2003) (holding that *Section 2* applied to Washington's felon disenfranchisement law), *cert. denied*, 160 L. Ed. 2d 365, 125 S. Ct. 477 (2004); *Wesley v. Collins*, 791 F.2d 1255, 1259-61 (6th Cir. 1986) (assuming that Section 2 of the VRA applies to felon disenfranchisement laws but holding that there was no violation); *see also Farrakhan v. Washington*, 359 F.3d 1116 (9th Cir. 2004) (Kozinski, J., dissenting from denial of rehearing en banc) (arguing that Section 2 of the VRA does not apply to felon disenfranchisement laws).

1. The Scope of the Voting Rights Act

Congress enacted the Voting Rights Act pursuant to its enforcement powers under the Fourteenth and Fifteenth Amendments for the remedial purpose of eliminating racially discriminatory voting practices. *South Carolina v. Katzenbach*, 383 U.S. 301, 308, 15 L. Ed. 2d 769, 86 S. Ct. 803 (1966); *United States v. Marengo County Commission*, 731 F.2d 1546, 1555 (11th Cir. 1984). Recognizing the subtle ways that states often denied racial minorities the right to vote, in 1982, Congress amended Section 2 of the Voting Rights Act so that a plaintiff could establish a violation without proving discriminatory intent.[25] *See Chisom v. Roemer*, 501 U.S. 380, 383-84, 115 L. Ed. 2d 348, 111 S. Ct. 2354 (1991). Thus, it is well-settled

25. Specifically, Congress amended the Voting Rights Act in 1982 in response to the Supreme Court's holding in *City of Mobile v. Bolden*, 446 U.S. 55, 64 L. Ed.2d 47, 100 S.Ct. 1490 (1980), which required proof of intentional discrimination to establish a violation under Section 2.

that a plaintiff can challenge voting qualifications under a "results" test.[26] *Id.* Section 2 of the Voting Rights Act of 1965, 42 U.S.C. § 1973, as amended, provides in relevant part[27]:

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26. Two types of discriminatory practices and procedures are covered by section 2: those that result in "vote denial" and those that result in "vote dilution." The plaintiffs' claim here is one of vote denial. Vote denial occurs when a state employs a "standard, practice, or procedure" that results in the denial of the right to vote on account of race. 42 U.S.C. § 1973(a); *Burton v. City of Belle Glade*, 178 F.3d 1175, 1197-98 (11th Cir. 1999). To prevail, a plaintiff must prove that "under the totality of the circumstances, . . . the political processes . . . are not equally open to participation by [members of a protected class] . . . in that its members have less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice." 42 U.S.C. § 1973(b). In making this inquiry, courts consider a non-exclusive list of objective factors (the "Senate factors") detailed in a Senate Report accompanying the 1982 amendments. See S.Rep. No. 97-417, at 28-29, 1998 U.S.C.C.A.N. at 206; *Thornburg v. Gingles*, 478 U.S. 30, 36, 92 L. Ed. 2d 25, 106 S. Ct. 2752 (1986). Because we conclude that Section 2 of the Voting Rights Act does not reach Florida's felon disenfranchisement provision, there is no need to consider the plaintiffs' evidence of alleged discrimination in Florida's criminal justice system which might be relevant under the totality of the circumstances inquiry.

27. The full text, as amended in 1982, states:

> (a) No voting qualification or prerequisite to voting or standard, practice, or procedure shall be imposed or applied by any State or political subdivision in a manner which results in a denial or abridgement of the right of any citizen of the United States to vote on account of

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(a) No voting qualification or prerequisite to voting or standard, practice, or procedure shall be imposed or applied by any State or political subdivision in a manner which results in a denial or abridgement of the right of any citizen of the United States to vote on account of race or color. . .

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race or color, or in contravention of the guarantees set forth in section 1973b(f)(2) of this title, as provided in subsection (b) of this section.

(b) A violation of subsection (a) of this section is established if, based on the totality of circumstances, it is shown that the political processes leading to nomination or election in the State or political subdivision are not equally open to participation by members of a class of citizens protected by subsection (a) of this section in that its members have less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice. The extent to which members of a protected class have been elected to office in the State or political subdivision is one circumstance which may be considered. *Provided*, that nothing in this section establishes a right to have members of a protected class elected in numbers equal to their participation in the population.

42 U.S.C. § 1973.

> (b) A violation of subsection (a) of this section is established if, based on the totality of the circumstances, it is shown that . . . members [of protected racial minorities] have less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice.

42 U.S.C. § 1973. Despite its broad language, Section 2 does not prohibit all voting restrictions that may have a racially disproportionate effect. *See Chisom*, 501 U.S. at 383 ("Congress amended § 2 of the Voting Rights Act to make clear that *certain* practices and procedures that result in the denial or abridgement of the right to vote are forbidden even though the absence of proof of discriminatory intent protects them from constitutional challenge.") (emphasis added); *Muntaqim*, 366 F.3d at 116. Felon disenfranchisement laws are unlike other voting qualifications. These laws are deeply rooted in this Nation's history[28] and are a punitive device stemming from criminal law. *See Richardson*, 418 U.S. at 48-52. Today, all states except two have some form of criminal disenfranchisement provision.

Most important, Florida's discretion to deny the vote to convicted felons is fixed by the text of § 2 of the Fourteenth Amendment, which states:

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28. When the Fourteenth Amendment was ratified, twenty-nine out of thirty-six states had some form of criminal disenfranchisement provision. *Richardson*, 418 U.S. at 48. The prevalence of these laws before African-Americans were granted the right to vote indicates that states have historically maintained these laws for race-neutral reasons.

> [W]hen the right to vote . . . is denied to any of the male inhabitants . . . or in any way abridged, *except for participation in rebellion, or other crime*, the basis of representation therein shall be reduced in the proportion which the number of such male citizens shall bear to the whole number of male citizens twenty-one years of age in such State.

U.S. Const. amend. XIV, § 2 (emphasis added).[29] As the Court explained in *Richardson*, "the exclusion of felons from the vote has an affirmative sanction in section 2 of the Fourteenth Amendment, a sanction which was not present in the case of the other restrictions on the franchise which were invalidated [in other cases]." 418 U.S. at 54. Thus, interpreting Section 2 of the Voting Rights Act to deny Florida the discretion to disenfranchise felons raises serious constitutional problems because such an interpretation allows a congressional statute to override the text of the Constitution.

It is a long-standing rule of statutory interpretation that federal courts should not construe a statute to create a constitutional question unless there is a clear statement from

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29. The plaintiffs argue that the Fourteenth Amendment's endorsement of felon disenfranchisement laws should not control our analysis because the Fifteenth Amendment does not contain similar language and, in their view, the Fifteenth Amendment repealed § 2 of the Fourteenth Amendment. The plaintiffs cite to no case law to support this bold assertion and we find no merit in this argument. The plain text of the Constitution is clear and we must follow it.

Congress endorsing this understanding.[30] As the Supreme Court stated in *DeBartolo Corp. v. Florida Gulf Coast Trades Council:*

> [W]here an otherwise acceptable construction of a statute would raise serious constitutional problems, the Court will construe the statute to avoid such problems unless such construction is

30. Before turning to a canon of statutory interpretation, we must find some level of ambiguity in the words of the statute. *Dep't of HUD v. Rucker*, 535 U.S. 125, 134, 152 L. Ed. 2d 258, 122 S. Ct. 1230 (2002); *Harry v. Marchant*, 291 F.3d 767, 770 (11th Cir. 2002) (*en banc*). Although Section 2 of the VRA does not require proof of intentional discrimination behind the enactment of the challenged voting qualification, Congress's decision to retain the phrase "on account of race or color" makes it unclear as to whether Section 2 would apply to Florida's felon disenfranchisement provision, which is endorsed by the Fourteenth Amendment, applies to felons without regard to race or color (it is particularly telling that over seventy percent of the plaintiffs' class is white), and is administered as one component of a felon's criminal sentence. *See Muntaqim*, 366 F.3d at 116; *Nipper v. Smith*, 39 F.3d 1494, 1515 (11th Cir. 1994) ("to be actionable, a deprivation of a minority group's right to equal participation in the political process must be on account of a classification, decision, or practice that depends on race or color, *not on account of some other racially neutral cause.*") (emphasis added). Moreover, the deep division among eminent judicial minds on this issue demonstrates that the text of Section 2 is unclear. *See Muntaqim*, 366 F.3d at 116-118 ("Unfortunately, it 'is exceedingly difficult to discern what [Section 2] means.'"). Finally, the interpretation of the statute advanced by the dissenters would suggest that currently incarcerated felons may also fall within the scope of the statute. Unless one concedes that Section 2 of the VRA reaches currently incarcerated felons, the interpretation advanced by the dissenters provides an additional reason why the statute is unclear.

> plainly contrary to the intent of Congress. This cardinal principle has its roots in Chief Justice Marshall's opinion for the Court in *Murray v. The Charming Betsy*, 6 U.S. (2 Cranch) 64, 118, 2 L. Ed. 208 (1804), and has for so long been applied by this Court that it is beyond debate . . . This approach not only reflects the prudential concern that constitutional issues not be needlessly confronted, but also recognizes that Congress, like this Court, is bound by and swears an oath to uphold the Constitution. The courts will therefore not lightly assume that Congress intended to infringe constitutionally protected liberties or usurp power constitutionally forbidden it.

485 U.S. 568, 575, 99 L. Ed. 2d 645, 108 S. Ct. 1392 (1988). Thus, when we analyze the scope of the Voting Rights Act, we should first address whether one interpretation presents grave constitutional questions whereas another interpretation would not, and then examine whether the latter interpretation is clearly contrary to Congressional intent. *Id.*

Here, the plaintiffs' interpretation creates a serious constitutional question by interpreting the Voting Rights Act to conflict with the text of the Fourteenth Amendment.[31]

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31. In saying this, we in no way doubt Congress's authority to enact the VRA nor do we question that, as a general rule, the results test of Section 2 is constitutionally sound. *See United States v. Marengo County Comm'n*, 731 F.2d 1546, 1556-63 (11th Cir. 1984) (holding that Section 2's results test is constitutional on its face). The only issue here is our *concern* over whether Congress would

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The Fourteenth and Fifteenth Amendments to the United States Constitution grant Congress the power to enforce those amendments' substantive provisions "by appropriate legislation." U.S. Const. amend. XIV, § 5; XV, § 2. Congress may enforce the substantive provisions of these Amendments by regulating conduct that does not directly violate those Amendments. *See South Carolina v. Katzenbach*, 383 U.S.

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exceed its authority if we were to apply Section 2 to Florida's felon disenfranchisement law. Even assuming *arguendo* that Section 2 of the VRA applies to Florida's provision, a review of the record strongly suggests that the plaintiffs' Section 2 claim would still fail. The plaintiffs would have to demonstrate that specific and relevant racial biases in society interact with the felon disenfranchisement rule, resulting in a denial of the franchise "*on account of race or color.*" *Cf. Thornburg v. Gingles*, 478 U.S. 30, 47, 92 L. Ed. 2d 25, 106 S. Ct. 2752 (1986) (stating that the Voting Rights Act requires that electoral practices interact with social or historical conditions to *cause* a racial inequality in the political process); *Nipper v. Smith*, 39 F.3d 1494, 1515 (11th Cir. 1994) ("The existence of some form of racial discrimination remains the cornerstone of Section 2 claims . . ."). We are concerned only with how the state allegedly discriminates against similarly situated persons who have committed felonies. Although the record includes some evidence of a statistical difference in the rate of felony convictions along racial lines, these disparities do not demonstrate racial bias. There are a myriad of factors other than race that may explain the disparity. For example, an individual's socioeconomic status, prior criminal record, gravity of offense, strength of evidence, nature of legal representation, and age of offender might explain the disparity. Moreover, the plaintiffs'own expert found that *whites* have disproportionately high conviction rates for four of the nine categories of crimes he analyzed. Furthermore, there is no significant racial disparity in the sentences received by convicts with similar guideline scores.

301, 15 L. Ed. 2d 769, 86 S. Ct. 803 (1966). As the Court has explained, "Congress may enact so-called prophylactic legislation that proscribes facially constitutional conduct, in order to prevent and deter unconstitutional conduct." *Nevada Dep't of Human Resources v. Hibbs*, 538 U.S. 721, 727-28, 155 L. Ed. 2d 953, 123 S. Ct. 1972 (2003).

Nonetheless, Congress's power in this regard is not absolute. To be a valid exercise of Congress's enforcement power, "there must be a congruence and proportionality between the injury to be prevented or remedied and the means adopted to that end." *City of Boerne v. Flores*, 521 U.S. 507, 520, 138 L. Ed. 2d 624, 117 S. Ct. 2157 (1997). Congress undoubtedly has the constitutional authority to prohibit many measures that are not explicitly prohibited by the Fourteenth Amendment, but this enforcement power arguably does not extend to prohibiting constitutionally protected practices. This is not to say that a state's felon disenfranchisement provision can never be challenged. As the Court's decision in *Hunter* made clear, states cannot use disenfranchisement provisions to discriminate intentionally on the basis of race. 471 U.S. at 233. Thus, the plaintiffs have a remedy if the state's provision violates the Equal Protection Clause. *Id.* It is a different matter, however, when a federal statute is read to limit a state's delegated power.

Moreover, as the Second Circuit detailed in *Muntaqim*, there are additional reasons why the plaintiffs' interpretation of the Voting Rights Act calls into question Congress's enforcement power. 366 F.3d at 118-26. For Congress to enact proper enforcement legislation, there must be a record of

constitutional violations.[32] *See Board of Trustees of University of Alabama v. Garrett*, 531 U.S. 356, 368, 148 L. Ed. 2d 866, 121 S. Ct. 955 (2001); *Kimel v. Florida Bd. of Regents*, 528 U.S. 62, 89, 145 L. Ed. 2d 522, 120 S. Ct. 631 (2000). In *Oregon v. Mitchell*, 400 U.S. 112, 118, 27 L. Ed. 2d 272, 91 S. Ct. 260 (1970), superseded by U.S. Const. amend. XXVI, the Court reviewed the 1970 amendments to the Voting Rights Act, which imposed a temporary ban on literacy tests and lowered from 21 to 18 the minimum voting age. There, the Court affirmed the literacy test ban but held that Congress exceeded its authority in lowering the voting age from 21 to 18 in state elections. The Court concluded that "Congress had before it a long history of discriminatory use of literacy tests to disenfranchise voters on account of their race" but "Congress made no legislative findings that

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32. As the Court has explained, Congress must (1) "identify conduct transgressing . . . the substantive provisions" of the amendments and (2) "tailor its legislative scheme to remedying or preventing such conduct." *Florida Prepaid Postsecondary Educ. Expense Bd. v. College Savs. Bank*, 527 U.S. 627, 639, 144 L. Ed. 2d. 575, 119 S. Ct. 2199 (1999). In addition to the absence of findings showing that felon disenfranchisement laws are used to discriminate, it is also questionable whether applying Section 2 to reach all felon disenfranchisement laws would be a congruent and proportionate response to the purported problem with these laws. Section 2 applies nationwide to all states and there is no termination date. Given that racial minorities are overrepresented in the felon population, the plaintiffs' theory would cast into doubt most felon disenfranchisement laws in this country. *See Boerne*, 521 U.S. at 533 (noting that although enforcement legislation need not have "termination dates, geographic restrictions, or egregious predicates . . . limitations of this kind tend to ensure Congress' means are proportionate to ends legitimate under" the Enforcement Clause).

the 21 year old requirement was used by the States to disenfranchise voters on account of race." *Mitchell*, 400 U.S. at 130, 132.

As was the case in *Mitchell*, when Congress enacted the VRA and its subsequent amendments, there was a complete absence of congressional findings that felon disenfranchisement laws were used to discriminate against minority voters.[33] Without a record of constitutional violations, applying Section 2 of the Voting Rights Act to Florida's felon disenfranchisement law would force us to address whether Congress exceeded its enforcement powers under the Fourteenth and Fifteenth Amendments.[34]

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33. The plaintiffs suggest that it is unreasonable to require a specific record of violations because Congress could not identify every form of voting discrimination when it enacted the Voting Rights Act. Given the widespread existence of felon disenfranchisement laws throughout this Nation's history and the fact that many States had such laws on their books when the VRA was enacted, we find no merit in this argument.

34. The plaintiffs concede that Congress compiled no record of constitutional violations with respect to felon disenfranchisement provisions. They contend, however, that Congress's enforcement power is broader when it acts to prohibit discrimination against a suspect class or to protect a fundamental right such as voting. *See Tennessee v. Lane*, 541 U.S. 509, 158 L. Ed. 2d 820, 124 S. Ct. 1978, 1991-92 (2004) (court access); *Hibbs*, 538 U.S. at 735-36 (sex). Although this is true, the Supreme Court still requires *some* record of constitutional violations to ensure that Congress had an adequate constitutional basis for prophylactic legislation. *Hibbs*, 538 U.S. at 735; *Lane*, 124 S. Ct. at 1992. The plaintiffs also cite to the Court's

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For these reasons, we believe that the plaintiffs' interpretation of the VRA raises grave constitutional concerns.[35] For the plaintiffs' interpretation to be correct, we

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decision in *Hunter v. Underwood* as evidence of a record of constitutional violations with regard to felon disenfranchisement provisions. A key problem with this argument is that the Court did not decide *Hunter* until 1985, three years after the 1982 amendments to the Voting Rights Act. Thus, Congress could not have relied on *Hunter* when it enacted the amended Section 2 of the Voting Rights Act. Moreover, evidence of a purposefully discriminatory criminal disenfranchisement law in Alabama could not justify congressional regulation of Florida's law, which was enacted for race-neutral reasons.

35. We also note that application of the VRA to Florida's felon disenfranchisement provision could raise federalism concerns in that it significantly alters the constitutionally mandated balance of power between the States and the Federal Government. *See Gregory v. Ashcroft*, 501 U.S. 452, 457-61,115 L. Ed. 2d 410, 111 S. Ct. 2395 (1991). Whenever Congress intrudes upon "a decision of the most fundamental sort for a [State], . . . 'it is incumbent upon the federal courts to be certain of Congress' intent before finding that federal law overrides' this balance." *Gregory v. Ashcroft*, 501 U.S. at 461 (quoting *Atascadero State Hosp. v. Scanlon*, 473 U.S. 234, 243, 87 L.Ed.2d 171, 105 S.Ct. 3142 (1985)). Congress's intent must be "unmistakably clear in the language of the statute." *Id.* at 460-61, 111 S.Ct. 2395. In *Gregory*, Missouri state court judges challenged a provision of the Missouri Constitution that required certain judges to retire at the age of seventy as being in violation of the Age Discrimination in Employment Act of 1967, as amended, 29 U.S.C. §§ 621-634 (ADEA). After concluding that "the authority of the people of the States to determine the qualifications of their most important government officials . . . lies at the heart of representative

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must look for a clear statement from Congress that it intended such a constitutionally-questionable result. *DeBartolo*, 485 U.S. at 575. Instead of a clear statement from Congress indicating that the plaintiffs' interpretation is correct, the legislative history indicates just the opposite—that Congress never intended the Voting Rights Act to reach felon disenfranchisement provisions.[36]

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government," the Court found that state judges were not covered by the ADEA because Congress did not make their inclusion unmistakably clear. *Id.* at 467. As in *Gregory*, the balance of power between the States and the Federal Government is at issue in this case. If defining the qualifications of important government officials lies at the heart of representative government, then surely defining who decides what those qualifications will be is equally important. Although the States' power in this regard must be exercised in accordance with the Fourteenth and Fifteenth Amendments, § 2 of the Fourteenth Amendment establishes an explicit constitutional balance between the States and the Federal Government by giving the States authority to continue the prevalent practice of disenfranchising felons. If Congress wishes to alter the balance of power in this area, its intention must be unmistakably clear.

36. Only the Ninth Circuit has found a felon disenfranchisement provision to be a statutory violation. *Farrakhan v. Washington*, 338 F.3d 1009 (9th Cir. 2003). There, the plaintiffs brought a Voting Rights Act challenge to the State of Washington's felon disenfranchisement provision, claiming that racism in the criminal justice system interacted with the state's suffrage laws to deny equal voting opportunities to minorities. *Id.* at 1020. The Ninth Circuit reversed the grant of summary judgment, but did not specifically address the constitutionality of its interpretation. Logically, that court must have found that the statute covered the challenged provision

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2. Congressional Statements in 1965

Congress first passed the Act in 1965 to prevent states from discriminating against minorities in voting. The act was intended to reach voting tests and other practices, such as districts designed by states to minimize minority voting. *See Burton v. City of Belle Glade*, 178 F.3d 1175, 1196 (11th Cir. 1999). The Senate and House reports strongly suggest, however, that Congress did not intend Section 2 of the Voting Rights Act to cover felon disenfranchisement provisions.[37] These reports indicate that tests for literacy or good moral character should be scrutinized, but felon disenfranchisement provisions should not. S. Rep. 89-162, 1965 U.S.C.C.A.N. 2508, 2562. The only place where legislators addressed felon disenfranchisement was with regard to Section 4 of the VRA, where the Senate Report reflects that legislators intended to *exempt* the voting restrictions on felons from the statute's coverage, stating:

> The third type of test or device covered is any requirement of good moral character. This

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and that Congress had the constitutional authority to regulate felon disenfranchisement provisions to reach its holding. Nevertheless, the Ninth Circuit did not provide any reasoning for its finding, and thus that court's decision, which is only persuasive authority in our circuit, should not compel our analysis.

37. We recog..ize that there is no legislative history directly referencing Section 2 of the VRA that mentions felon disenfranchisement provisions. Nonetheless, we find Congress's treatment of these provisions in reference to other sections of the VRA to be persuasive on this matter.

> definition would not result in the proscription of the frequent requirement of States and political subdivisions that an applicant for voting or registration for voting be free of conviction of a felony or mental disability.

Id. Likewise, the House Report also states that the Voting Rights Act was not designed to reach felon disenfranchisement provisions:

> This subsection does not proscribe a requirement of a State or any political subdivision of a State that an applicant for voting or registration for voting be free of conviction of a felony or mental disability.

H.R. Rep. No. 89-439, 1965 U.S.C.C.A.N. 2437, 2457. These reports indicate that neither house of Congress intended to include felon disenfranchisement within the statute's scope. These are the only references to felon disenfranchisement made in reports to the 1965 act.

Furthermore, this court's predecessor decided that the 1965 Act did not cover a state's decision to exclude felons from voting. In *United States v. Ward*, the former Fifth Circuit held that the Voting Rights Act prohibited Louisiana from imposing any literacy test or other qualification on voter registration, but found that the act did not extend to felon disenfranchisement rules. 352 F.2d 329, 332 (5th Cir. 1965).[38]

38. In *Bonner v. City of Prichard*, 661 F.2d 1206, 1209 (11th Cir. 1981) (*en banc*), this court adopted as binding precedent all decisions of the former Fifth Circuit handed down prior to October 1, 1981.

There, the court issued an order enjoining the state from applying the voting tests, but explicitly exempted felony convictions from the order. The court ordered that the state cease

> . . . requiring any applicant for voter registration in Madison Parish, as a precondition to such registration, to take or pass any test of literacy, knowledge, or understanding or to comply with any other test or device as defined in Section 4(c) of the Voting Rights Act of 1965, Public Law 89-110, 79 Stat. 438-439, i.e., any requirement (including the "good character" requirement specified in Article VIII, Section 1(c) of the Louisiana Constitution and Title 18, Section 32, of the Louisiana Code, *except to the extent that these provisions permit disqualification for conviction of a felony).*

Id. at 332 (emphasis added).

3. Congressional Statements in 1982

Congress most recently amended the Voting Rights Act in 1982 in response to the Supreme Court's decision in *City of Mobile v. Bolden*, 446 U.S. 55, 64 L. Ed. 2d 47, 100 S. Ct. 1490 (1980), in an attempt to clarify the standard for finding Section 2 violations. In revising the statute, Congress intended to depart from the intent-based standard of the Supreme Court's Equal Protection jurisprudence and establish an effects-based standard. S. Rep. 97-417, 15-17, 1982 U.S.C.C.A.N. 177, 192-94 (1982). After the 1982

amendment, a state practice could survive Equal Protection Clause scrutiny but fail Section 2 Voting Rights Act scrutiny.

Neither the plain text nor the legislative history of the 1982 amendment declares Congress's intent to extend the Voting Rights Act to felon disenfranchisement provisions. The Senate Report, which details many discriminatory techniques used by certain jurisdictions, made no mention of felon disenfranchisement provisions.[39] Although it is conceivable that certain legislators may have wanted the Voting Rights Act to encompass felon disenfranchisement provisions, we should not assume that Congress intended to produce a statute contrary to the plain text of the Fourteenth Amendment without a clear statement. As the Second Circuit noted in *Muntaqim*, "considering the prevalence of felon disenfranchisement [provisions] in every region of the country since the Founding, it seems unfathomable that Congress would silently amend the Voting Rights Act in a way that would affect them." 366 F.3d at 123-24. There is simply no discussion of felon disenfranchisement in the legislative history surrounding the 1982 amendments.

39. The one-sided legislative history is buttressed by subsequent Congressional acts. Since 1982, Congress has enacted laws making it *easier* for states to disenfranchise felons. For instance, in 1993, Congress enacted the National Voter Registration Act (NVRA), Pub. L. No. 103-31, 107 Stat. 77 (1993), which authorizes states to purge felons from voter rolls. 42 U.S.C. § 1973gg-6(a)(3)(B). The Act also instructs federal prosecutors to give written notice to state election officials of persons convicted of felonies. 42 U.S.C. § 1973gg-6(g)(3). In this same Act, Congress sought to eliminate certain practices that dampen minority participation in the electoral process. Although not dispositive, this suggests that Congress did not intend to sweep felon disenfranchisement laws within the scope of the VRA.

Thus, we believe that applying Section 2 of the Voting Rights Act to felon disenfranchisement provisions raises grave constitutional concerns.[40] Chiefly, the plaintiffs' interpretation calls for a reading of the statute which would prohibit a practice that the Fourteenth Amendment permits Florida to maintain. As a matter of statutory construction, we should avoid such an interpretation. The case for rejecting the plaintiffs' reading of the statute is particularly strong here, where Congress has expressed its intent to *exclude* felon disenfranchisement provisions from Voting Rights Act scrutiny. Accordingly, we affirm the district court's grant of summary judgment to the defendants on the Voting Rights Act claim.

V. Wisdom of the Policy

Several amici curiae argue that, as a policy matter, felons should be enfranchised, particularly those who have served their sentences and presumably paid their debt to society. Even if we were to agree with the amici, this is a policy decision that the United States Constitution expressly gives to the state governments, not the federal courts. U.S. Const. Amend. XIV, § 2. Florida has legislatively reexamined this provision since 1868 and affirmed its decision to deny felons

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40. In addition to the constitutional concerns, there are prudential concerns as well. If we were to accept the plaintiffs' interpretation of the statute, states might lose their ability to exclude felons currently in prison from the franchise. *See Farrakhan*, 359 F.3d at 1125-27 (Kozinski, J., dissent from denial of rehearing en banc) (discussing the slippery slope problems of applying the Voting Rights Act to felon disenfranchisement provisions including implications for voter lists, Internet voting, and weekday elections).

the right to vote. Federal courts cannot question the wisdom of this policy choice.

VI. Conclusion

For the foregoing reasons, we AFFIRM the district court's grant of summary judgment in favor of the defendants.

AFFIRMED.

CONCUR BY: TJOFLAT; WILSON

CONCUR BY: TJOFLAT, Circuit Judge, specially concurring, in which, PRYOR, Circuit Judge, joins: Section 2 of the Voting Rights Act (VRA) "outlaws election practices that result in racial discrimination." *Nipper v. Smith*, 39 F.3d 1494, 1509-10 (11th Cir. 1994) (*en banc*) (opinion of Tjoflat, C.J., joined by Anderson, J.). Specifically, it bars any "voting qualification or prerequisite to voting or standard, practice, or procedure . . . which results in a denial or abridgement of the right of any citizen of the United States to vote on account of race or color." 42 U.S.C. § 1973(a). Focusing only on the "which results in" language, both dissenters argue that we should remand this case to the district court for a trial to determine whether Florida's felon-disenfranchisement provision[1] produces a racially disparate impact. The majority argues that remand is inappropriate because the dissenters' theory creates a constitutional question that can be avoided by construing the statute not to cover felon-disenfranchisement provisions.[2] I write separately to demonstrate that, even if the dissenters are correct that the language of section 2 of the VRA unambiguously covers felon disenfranchisement provisions, summary judgment was appropriate in this case because the plaintiffs have not been able to show that whatever denial or abridgement of voting rights resulted from Florida's felon

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1. The Florida constitution provides that "[n]o person convicted of a felony . . . shall be qualified to vote or hold office until restoration of civil rights." Fla. Const. art. VI, § 4 (1968).

2. The constitutional question is created by the Fourteenth Amendment's savings clause regarding such provisions. *See* U.S. Const. amend. XIV, § 2.

disenfranchisement provision occurred "on account of race or color." Remand is therefore not required.

It is true that section 2 of the VRA now requires something less than a showing of actual intent to discriminate by a State or political subdivision. I do not believe, however, that it requires only, as both dissenters imply, a showing of racially disparate effects. A brief discussion of section 2's history demonstrates this point. In 1980, the Supreme Court decided *City of Mobile v. Bolden*, 446 U.S. 55, 64 L. Ed. 2d 47, 100 S. Ct. 1490 (1980). Prior to its holding in that case, a number of circuits had applied a "totality of the circumstances" analysis in vote-dilution cases brought under the Equal Protection Clause of the Fourteenth Amendment. The old Fifth Circuit, our predecessor court, established the framework for this kind of analysis in *Zimmer v. McKeithen*, 485 F.2d 1297 (5th Cir. 1973). That framework required courts to judge vote-dilution cases by measuring the relevant facts according to a number of factors, now commonly referred to as *Zimmer* factors.[3] Importantly for purposes of

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3. Those factors are canvassed in the original opinion:

> It is axiomatic that at-large and multi-member districting schemes are not per se unconstitutional. Nevertheless, where the petitioner can demonstrate that "its members had less opportunity than did other residents in the district to participate in the political processes and to elect legislators of their choice," *White v. Regester*, 412 U.S. [755,] 766, 93 S.Ct. [2332,] 2339, 37 L. Ed. 2d [314 (1973)], *Whitcomb v. Chavis*, 403 U.S. [124,] 149-150, 403 U.S. 124, 29 L. Ed. 2d 363, 91 S. Ct. 1858 [, 1872 (1971)], such districting schemes are constitutionally infirm. (Cont'd)

this discussion, those factors required a showing of something less than intent by a State actor to discriminate, but something more than a mere disparate impact to make out a claim of vote dilution.

Bolden involved a challenge to an at-large election arrangement in a multimember district in Mobile, Alabama. In that case, the Supreme Court held that *Zimmer*, "coming before *Washington v. Davis*, 426 U.S. 229, 48 L. Ed. 2d

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> The Supreme Court has identified a panoply of factors, any number of which may contribute to the existence of dilution. Clearly, it is not enough to prove a mere disparity between the number of minority residents and the number of minority representatives .... [W]here a minority can demonstrate a lack of access to the process of slating candidates, the unresponsiveness of legislators to their particularized interests, a tenuous state policy underlying the preference for multi-member or at-large districting, or that the existence of past discrimination in general precludes the effective participation in the election system, a strong case is made. Such proof is enhanced by a showing of the existence of large districts, majority vote requirements, antisingle shot voting provisions and the lack of provision for at-large candidates running from particular geographical subdistricts. The fact of dilution is established upon proof of the existence of an aggregate of these factors. The Supreme Court's recent pronouncement in *White v. Regester* demonstrates, however, that all these factors need not be proved in order to obtain relief.

Zimmer, 485 F.2d at 1304-05 (footnotes and internal cross-references omitted).

597, 96 S. Ct. 2040 . . . , was quite evidently decided upon the misunderstanding that it is not necessary to show a discriminatory purpose in order to prove a violation of the Equal Protection Clause—that proof of a discriminatory effect is sufficient." *Bolden*, 446 U.S. at 71, 100 S. Ct. at 1501-02.[4] The Court viewed this conclusion as inescapable in light of *Davis*, and it concluded that to make out a vote-dilution claim a "plaintiff must prove that the disputed plan was 'conceived or operated as [a] purposeful devic[e] to further . . . discrimination.'" *Id.* at 66, 100 S. Ct. at 1499 (quoting *Whitcomb v. Chavis*, 403 U.S. 124, 149, 91 S.Ct. 1858, 1872, 29 L. Ed. 2d 363 (1971)) (alterations and omission original).

In addition to seeking relief under a vote-dilution theory under the Equal Protection Clause, the plaintiffs had also sought relief under the VRA. *Bolden* rejected this approach, too, holding that "it is apparent that the language of § 2 [of the VRA] no more than elaborates upon that of the Fifteenth Amendment, and the sparse legislative history of § 2 makes clear that it was intended to have an effect no different from that of the Fifteenth Amendment itself." *Id.* at 60-61, 100 S. Ct. at 1496 (footnote omitted). The Court noted explicitly that this meant by extension that section 2 as then written did not cover disparate-impact cases: "Our decisions . . . have made clear that action by a State that is racially

4. No one spoke for the Court in *Bolden*. Although six Justices concurred in the Court's judgment, Justice Stewart wrote only for himself, Chief Justice Burger, and Justices Powell and Rehnquist. For purposes of brevity, I do not pause to make this observation at every reference to Justice Stewart's opinion.

neutral on its face violates the Fifteenth Amendment only if motivated by a discriminatory purpose." *Id.* at 62, 100 S. Ct. at 1497.

Apparently alarmed by these holdings, Congress set out to amend the VRA, ultimately doing so in 1982. See generally S. Rep. No. 97-417 (1982), reprinted in 1982 U.S.C.C.A.N. 177; *see also* Voting Rights Act Amendments, Pub. L. No. 97-205, 96 Stat. 131 (1982). The effect of this amendment was to recast the then-existing version of section 2 as section 2(a) of the VRA and to add a new subsection, subsection (b).

The wording of the new section 2(a) is not identical to the old section 2. The new section 2(a) made two modifications: first, it made one change in phrasing. *Compare* 42 U.S.C. § 1973 (preamendment) ("No voting qualification . . . shall be imposed or applied by any State or political subdivision to deny or abridge the right of any citizen of the United States to vote on account of race or color." (emphasis added)), with 42 U.S.C. § 1973(a) *(postamendment)* ("No voting qualification . . . shall be imposed or applied by any State or political subdivision in a manner which results in a denial or abridgment of the right of any citizen of the United States to vote on account of race or color." (emphasis added)). Second, 2(a) added a phrase to make clear that abridgement or denial could be recognized "as provided in subsection (b)." 42 U.S.C. § 1973(a). The intended effect of the second modification is obvious; that of the first less so. As I explain, the first modification reflects Congress's desire to remove an intent requirement, but it does not reflect a desire to replace it with a mere disparate-impact requirement.

It is clear from both the language of the new subsection (b) and the extensive Committee Report that accompanied the amendment that Congress intended to restore what it perceived to be the pre-*Bolden* status quo. Specifically, the subsection (b) language reflects vote-dilution rhetoric from pre-*Bolden* Supreme Court cases. Compare 42 U.S.C. § 1973(b) ("A violation . . . is established if, based on the totality of circumstances, it is shown that the political processes leading to nomination or election . . . are not equally open to participation by members of a class of citizens protected by subsection (a) of this section in that its members have less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice.") with, *e.g.*, *White v. Regester*, 412 U.S. 755, 766, 93 S. Ct. 2332, 2339, 37 L. Ed. 2d 314 (1973) ("The plaintiffs' burden is to produce evidence to support findings that the political processes leading to nomination and election were not equally open to participation by the group in question—that its members had less opportunity than did other residents in the district to participate in the political processes and to elect legislators of their choice."). The Committee Report specifically evinces the view of Congress that *Bolden* was contrary to its understanding of the operation of section 2, suggesting by strong implication at least that Congress had thought section 2 was operating successfully prior to *Bolden*. *See*, *e.g.*, S. Rep. 97-417, at 15 (1982), reprinted in 1982 U.S.C.C.A.N. at 192 ("The proposed amendment to Section 2 of the Voting Rights Act is designed to restore the legal standard that governed voting discrimination cases prior to the Supreme Court's decision in *Bolden*.").

Consistent with that intent, we have, as Judge Barkett suggests in her dissent, applied section 2 in the vote denial context. *See Burton v. City of Belle Glade*, 178 F.3d 1175, 1197-98 (11th Cir. 1999). Dismissing the vote-denial claim in a cursory manner in that case, however, we did not pause to establish the minimum requirements of a prima facie vote-denial claim under section 2, and the case is thus of dubious precedential value, especially in support of the proposition that mere disparate impact is sufficient to establish such a claim. In fact, if anything, our holding on the vote-denial claim in *Burton* stands for a contrary conclusion.[5] In short, nothing in *Burton* requires us to return this case to the district court simply because Florida's felon-disenfranchisement law disadvantages minorities out of proportion to their makeup of the general population of the State.

Thus, the pre-*Bolden* application of section 2, along with the legislative history surrounding the amendment and our own postamendment application of section 2 in the vote-denial context all point to the inexorable conclusion that something more than a mere showing of disparate effect is essential to a prima facie vote-denial case.[6] The reservoir of

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5. We can assume from the facts of *Burton* that the plaintiffs had alleged that the challenged policy in that case had in fact produced a disparate impact to the disadvantage of minority voters. By implication, that allegation was not in itself sufficient to sustain a vote-denial claim, as the court concluded that "Appellants have failed to raise a genuine issue of material fact as to whether they were denied the right to vote on account of rac *Burton*, 178 F.3d at 1198.

6. Additional support for this proposition can be found by implication in the final proviso of subsection (b): "*Provided*, That

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that requirement and the key to understanding the minimum content of such a case lie in the words "on account of" in subsection (a), for those words alone constrain the preceding, seemingly broad "applied in a manner which results in" language. Those words do not suggest, as the majority intimates, that Congress may have designed some lingering requirement of intent by state actors. *See ante*, at 1229 n. 30. Instead, as I have argued elsewhere, these words suggest a causation requirement, that is, a showing that racial bias in the relevant community *caused* the alleged vote denial or abridgment.[7] *Zimmer* set out some of the circumstantial

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nothing in this section establishes a right to have members of a protected class elected in numbers equal to their proportion in the population." 42 U.S.C. § 1973(b).

7. See *Nipper*, 39 F.3d at 1515-24; id. at 1524 (opinion of Tjoflat, C.J., joined by Anderson, J.) ("[A] plaintiff must prove invidious discrimination in order to establish a violation of section 2 of the Voting Rights Act. Specifically, the plaintiff may prove *either:* (1) discriminatory intent on the part of [state actors] . . . ; or (2) objective factors that, under the totality of the circumstances, show the exclusion of the minority group from meaningful access to the political process due to the interaction of racial bias in the community with the challenged voting scheme."); *Solomon v. Liberty County*, 899 F.2d 1012, 1032 (11th Cir. 1990) (*en banc*) (Tjoflat, C.J., specially concurring, joined by Fay, Edmondson, Cox, and Hill, JJ.) ("Prior to *Bolden*, in order to win a voting rights case, a plaintiff had to prove invidious discrimination. This could be done in one of two ways . . . . The invidious discrimination requirement, as well as the two methods of proving it, remained part of section 2 [after amendment]."). Essentially, section 2 reflects an acknowledgment

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factors that might be referred to in attempting to show such causation in the vote-dilution context, some of which are transferrable to the vote-denial context. I am mindful that voting rights are protected against "sophisticated as well as simple-minded modes of discrimination," *Lane v. Wilson*, 307 U.S. 268, 275, 59 S. Ct. 872, 876, 83 L. Ed. 1281 (1939), and that we should be alert to unconventional factors indicating bias-caused vote denials. But I do not believe there are any factors of causation, whether to be found in our precedent or in our wildest dreams, that can establish anything on the basis of the facts presented in this case other than that the cause of the denial of the right to vote to felons in Florida consists entirely of their conviction, not their race.

Nearly all of the evidence advanced by the plaintiffs demonstrates only disproportionality, but, as I have argued, it is a basic section 2 principle that something more must be

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by Congress that even a facially neutral voting scheme can operate as a circuit for the oppression of minority voters by powerful private parties regardless of legislative intent. It maintains a requirement, however, that such oppression be "on account of race or color," and thus that intent to produce a denial or abridgment of the right to vote on that basis be present somewhere in the relevant community.

The Supreme Court recently gave similar meaning to the analogous phrase "on the basis of" when it held that Title IX authorizes an implied private right of action based on a claim of retaliation for whistle-blowing. *See Jackson v. Birmingham Bd. of Educ.*, __ U.S. __, 161 L. Ed. 2d 361, slip op. at 4-5 (2005) (defining "retaliation" to be " 'on the basis of sex' because it is an *intentional response* to the nature of the complaint: an allegation of sex discrimination" (emphasis added)).

shown to survive summary judgment. Plaintiffs argue in their brief that their proof "was significantly more extensive than simply 'evidence of disproportionate impact,'" but they rely chiefly on "different outcomes for similarly situated offenders at various stages of the criminal justice process." The main thrust of their argument is that "racial bias in the criminal justice system" interacts with Florida's disenfranchisement provision to the disadvantage of minority voters. It is true that, if plaintiffs could support this claim with evidence, they might demonstrate the sort of causal connection between racial bias and disparate effect necessary to make out a vote-denial claim. But the evidence plaintiffs advance simply does not support this proposition, even if we were to reverse the district court's order excluding various experts from testifying. In fact, leaving aside the excluded evidence and raw disparate impact data, plaintiffs' brief does not appear to advance a single showing of contemporary race bias that ostensibly is producing the comparatively well-evidenced disparate-impact.[8]

Thus, I do not believe that plaintiffs have made a case sufficient to survive summary judgment. I would avoid the

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8. Furthermore, notwithstanding the requirement that we view plaintiffs' evidence favorably in light of the procedural posture of this case, their burden is significant in light of the numerous filters and checks built into our criminal justice system that are independently capable of weeding out cases improperly infused with racial motives. Those checks include grand juries, the right to a trial by a jury (and specifically by a jury whose composition has not been manipulated on the basis of race), an impartial judge supervising the trial, appellate and collateral state-court review, federal habeas review, and clemency.

task of determining whether a constitutional question is created by application of section 2 to felon-disenfranchisement provisions entirely and simply rule that plaintiffs do not have a case. In any event, even if the dissenters are correct that the majority has misanalyzed the statute's interpretation question, the majority has arrived at the correct judgment in this case. I thus concur.

DISSENT BY: WILSON; BARKETT

DISSENT: WILSON, Circuit Judge, concurring in part and dissenting in part.

I concur with the majority's holding that the defendants are entitled to summary judgment with respect to the plaintiffs' Equal Protection claim. Whatever discriminatory motives may have prompted Florida to enact the 1868 criminal disenfranchisement provision, the plaintiffs presented no evidence that intentional discrimination motivated the 1968 Constitutional Revision Committee. As a matter of law, the state met its burden by re-enacting the felon disenfranchisement provision without an impermissible motive, as suggested by *Hunter v. Underwood*, 471 U.S. 222, 228, 105 S. Ct. 1916, 1920, 85 L. Ed. 2d 222 (1985). For the reasons stated by the majority, I concur in affirming the district court's resolution of this claim.

I write separately, however, to dissent from the majority's conclusion that racially discriminatory felon disenfranchisement provisions are not cognizable under § 2 of the Voting Rights Act ("VRA"). The majority overstates the case for constitutional avoidance. Because it is possible to harmonize the text of the VRA with the Constitution, we should not stray from the plain text of the statute. *See City of Rome v. United States*, 446 U.S. 156, 172, 100 S. Ct. 1548, 1559, 64 L. Ed. 2d 119 (1980).

I. SCOPE OF THE VOTING RIGHTS ACT

Section 2 of the VRA prohibits "voting qualification[s] . . . imposed or applied by any State" that "results in a denial or abridgement" of the right to vote "on account of race or

color." 42 U.S.C. § 1973(a). As a comprehensive and expansive remedy for racially discriminatory denials of the right to vote, § 2 reaches a wide variety of electoral practices and schemes.[1] The standard for evaluating a § 2 claim is "based on the totality of the circumstances." 42 U.S.C. § 1973(b). As a purely textual matter, a voting qualification based on felony status that interacts with social and historical conditions to produce a racially discriminatory effect, such as race bias in the criminal justice system, falls within the scope of the VRA. *See Thornburg v. Gingles*, 478 U.S. 30, 45-47, 106 S. Ct. 2752, 2763-64, 92 L. Ed. 2d 25 (1986) (describing interactive standard that accounts for "past and present reality").

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1. *See, e.g., Morse v. Republican Party of Va.*, 517 U.S. 186, 116 S. Ct. 1186, 134 L. Ed. 2d 347 (1996) (exclusion of protected groups from a nominating convention); *White v. Regester*, 412 U.S. 755, 93 S. Ct. 2332, 37 L. Ed. 2d 314 (1973) (multi-member districts); *Arakaki v. Hawaii*, 314 F.3d 1091 (9th Cir. 2002) (restriction on race of candidate); *McMillan v. Escambia County*, 748 F.2d 1037 (11th Cir. 1984) (majority vote requirement in at-large election primary); *United States v. Marengo County Comm'n*, 731 F.2d 1546, 1574 (11th Cir. 1984) (at-large elections); *DeGrandy v. Wetherell*, 794 F. Supp. 1076 (N.D. Fla. 1992) (single-member districting plans); *Dillard v. Town of North Johns*, 717 F. Supp. 1471 (M.D. Ala. 1989) (selective withholding of candidacy requirement information and forms); *Harris v. Siegelman*, 695 F. Supp. 517 (M.D. Ala. 1988) (refusal to appoint minority registration and election officials); *Irby v. Fitz-Hugh*, 693 F. Supp. 424 (E.D. Va. 1988) (shift from elective to appointive system); *Brown v. Dean*, 555 F.Supp. 502 (D.C.R.I.1982) (location of polling place); *Arroyo v. Tucker*, 372 F.Supp. 764 (E.D. Pa. 1974) (English-only election system, where residents born in Puerto Rico do not speak, read, write, or comprehend English).

The majority fears that interpreting the VRA in this manner "raises serious constitutional problems." Consequently, the majority construes the statute to avoid this "conflict," reading the VRA to preclude challenges to criminal disenfranchisement provisions.

To reach its result, the majority places great stock in § 2 of the Fourteenth Amendment, which reduces a state's representation in Congress when the state denies its male citizens the right to vote unless it abridges the right "for participation in rebellion, or other crime." U.S. Const. amend. XIV, § 2. The majority characterizes this clause as *sui generis*—deeply rooted in our nation's history and fixed by the text of the Constitution. However, that Section does not constitute an affirmative grant of state power to disenfranchise criminals. Rather, as a Reconstruction Amendment, this Section was intended to punish states that were slow to grant the franchise by reducing their representation in Congress. In holding that states have unfettered discretion to disenfranchise criminals, the majority relies upon a clause that is an exception to this punishment.

Unlike the majority, I do not see a need to construe the statute in this manner. The "avoidance" canon of construction applies if there is ambiguous statutory language. *See Southlake Prop. Assoc., Ltd. v. City of Morrow*, 112 F.3d 1114, 1119 (11th Cir. 1997). Where, as here, there is no ambiguity, the "avoidance" doctrine should not be employed as a pretext for rewriting clear statutory language. *Harris v. Garner*, 216 F.3d 970, 984-85 (11th Cir. 2000) (citation omitted).

Furthermore, I do not think that § 2 of the Fourteenth Amendment amounts to a right to disenfranchise citizens at will, heedless of the consequences. It is a right only by implication, and therefore does not conflict with Congress's power to limit criminal disenfranchisement. The Fourteenth Amendment does not define the outer limits of a state's "right" to disenfranchise criminals, but it is certain that a state's right to disenfranchise is not absolute. States may not *intentionally* disenfranchise felons on account of race. *Hunter*, 471 U.S. at 233, 105 S. Ct. at 1922. Likewise, I believe that a state may not disenfranchise criminals in a manner resulting in a racially discriminatory denial of the right to vote. This is because the VRA reaches conduct for which it may not always be possible to prove purposeful discrimination. The VRA recognizes that discriminatory effects are probative of race bias in electoral schemes and practices.

In sum, § 2 of the Fourteenth Amendment does not conflict with Congress's attempts to prohibit criminal disenfranchisement that is not racially neutral. That clause does not limit Congress's power to prohibit a voting qualification that results in a denial of equal access to the electoral process on the basis of race or color. *See* 42 U.S.C. § 1973. I see no conflict between the Constitution and the VRA in this regard, and therefore I see no reason to interpolate an exemption that does not exist.

I do not quarrel with the state's discretion to disenfranchise felons as a matter of policy. Rather, I take issue with the majority's characterization of that discretion. Far from "deny[ing] Florida the discretion to disenfranchise

felons," as the majority fears, states are free "to disenfranchise convicted felons in a racially neutral manner—that is, in a manner that is neither racially motivated nor produces racially disproportionate effects." *Johnson v. Governor of Florida*, 353 F.3d 1287, 1306 n. 27 (11th Cir. 2003). My view is that the Voting Rights Act prohibits criminal disenfranchisement provisions that accomplish denial of the right to vote "on account of race." 42 U.S.C. § 1973(a).

Importantly, I am not convinced that the plaintiffs have proven their case. The plaintiffs' statistical evidence raises an inference that the disparate impact of felon disenfranchisement results from the interaction of that scheme with race bias in the criminal justice system and the lingering effects of racial exclusion.[2] In a trial on the merits,

2. Judge Tjoflat argues in his concurrence that a plaintiff's showing of disproportionate effect does not suffice to make out a *prima facie* case of a § 2 VRA claim. It is far from clear that the language of § 2 VRA claim reinstates the law of the pre-Bolden cases. Congress could have specified in § 2 that some of the *White* factors were strongly probative of intent, and that proof of "something more than effect" was the *sine qua non* of a § 2 claim, regardless of whether the proof was direct or indirect. *See White v. Regester*, 412 U.S. 755, 93 S. Ct. 2332, 37 L. Ed. 2d 314 (1973). Given Congress's express language, however, it is plausible that the amended § 2 was meant to ensure racial minorities equal access to the vote, regardless of intent. *See, e.g., City of Mobile v. Bolden*, 446 U.S. 55, 103-41, 100 S. Ct. 1490, 1519- 1539, 64 L. Ed. 2d 47 (1980) (Marshall, J., dissenting).

Indeed, it is far from clear that the state of pre-*Bolden* law did not recognize vote dilution claims based solely on effect. *See Burns*

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the defendants would be given every opportunity to present rebuttal evidence to question the methodology of this analysis or to present their own analysis explaining the disparity. I dissent because I believe that the district court's resolution of the merits was premature and that the plaintiffs were entitled to present their case at trial.

II. SCOPE OF CONGRESS'S POWER

The majority also suggests that, were a § 2 VRA claim challenging criminal disenfranchisement provisions cognizable, Congress might have exceeded its enforcement powers of the Fourteenth and Fifteenth Amendments. I respectfully disagree with this conclusion.

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v. Richardson, 384 U.S. 73, 88, 86 S. Ct. 1286, 1294, 16 L. Ed. 2d 376 (1966), (stating that the standard for vote dilution claim is "invidious effect"); *Fortson v. Dorsey*, 379 U.S. 433, 439, 85 S. Ct. 498, 501, 13 L. Ed. 2d 401 (1965) ("It might well be that, designedly *or otherwise*, a multi-member constituency apportionment scheme, under the circumstances of a particular case, would *operate* to minimize or cancel out the voting strength of racial or political elements of the voting population." (emphasis added)).

In the event that Judge Tjoflat's interpretation is the correct one (that proof of "something more" is required), I do not think that interpretation leads inexorably to the conclusion that a plaintiff's showing of disproportionate effect does not satisfy the summary judgment burden. On the contrary, one of the permissible inferences that can, and must, be drawn from the plaintiffs' showing here is that the disproportionate effect was caused by race. Thus, I believe that the plaintiffs have carried their summary judgment burden by producing evidence of a disproportionate effect.

Congress's enforcement authority is at its most expansive when protecting against discrimination based on suspect classifications or when protecting fundamental rights. Thus, to carry out the basic objectives of the Fourteenth and Fifteenth Amendments, Congress may enact "prophylactic legislation proscribing practices that are discriminatory in effect, if not in intent." *Tennessee v. Lane*, 541 U.S. 509, 124 S. Ct. 1978, 1986, 158 L. Ed. 2d 820 (2004) (upholding Title II of the Americans with Disabilities Act as a valid exercise of Congress's Fourteenth Amendment enforcement power); *see also City of Rome*, 446 U.S. 156, 100 S. Ct. 1548, 64 L. Ed. 2d 119 (upholding VRA's § 5 preclearance requirement for covered jurisdictions seeking electoral changes as a valid exercise of Congress's Fifteenth Amendment enforcement power).

Despite the strength of Congress's remedial enforcement power, it is not without limits. Congress's remedy must respond to states' actual violations of a protected right. *See Kimel v. Fla. Bd. of Regents*, 528 U.S. 62, 89, 120 S. Ct. 631, 649, 145 L. Ed. 2d 522 (2000); *Fla. Prepaid Postsecondary Educ. Expense Bd. v. Coll. Sav. Bank*, 527 U.S. 627, 640, 119 S. Ct. 2199, 2207, 144 L. Ed. 2d 575 (1999). Therefore, Congress must identify the "history and pattern of unconstitutional . . . discrimination" that it seeks to address, creating a legislative record to support its exercise of enforcement power. *Bd. of Trustees of the Univ. of Ala. v. Garrett*, 531 U.S. 356, 368, 121 S. Ct. 955, 148 L. Ed. 2d 866 (2001). Furthermore, valid § 5 legislation must exhibit "congruence and proportionality between the injury to be prevented or remedied and the means adopted to that end."

City of Boerne v. Flores, 521 U.S. 507, 520, 117 S. Ct. 2157, 2164, 138 L. Ed. 2d 624 (1997).[3]

Congress enacted the VRA pursuant to the enforcement clauses of the Fourteenth and Fifteenth Amendments in response to rampant violations of the right to vote. *United States v. Bd. of Comm'rs*, 435 U.S. 110, 126-27, 98 S. Ct. 965, 976-77, 55 L. Ed. 2d 148 (1978). The scope of the VRA and those amendments are not coterminous: As a remedial statute, the VRA reaches beyond what is prohibited by the Fourteenth and Fifteenth Amendments. *See, e.g., United States v. Marengo County Comm'n*, 731 F.2d 1546 (11th Cir. 1984). The VRA not only safeguards a fundamental right, voting, but also protects against discrimination based on race, a suspect class. *See Lane*, 214 S. Ct. at 1992 (noting that because fundamental rights, such as access to the courts, receive heightened scrutiny, review of the legislative record for a pattern of constitutional violations is less s[illegible]rching); *Nev. Dep't of Human Res. v. Hibbs*, 538 U.S. 721, 735-36, 123 S. Ct. 1972, 1981-82, 155 L. Ed. 2d 953 (2003) (explaining that for suspect classifications, such as sex, that are subject to heightened scrutiny, it is "easier for Congress to show a pattern of state constitutional violations"). The Act is properly considered a remedial statute, passed with the broadest exercise of power allowed under the Fourteenth and Fifteenth Amendments.

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3. It bears noting that the Supreme Court has yet to determine whether the "congruence and proportionality" test applies to the Fifteenth Amendment. I assume here that it would. Because the VRA is a congruent and proportional remedy, and therefore well within Congress's enforcement power under the Fourteenth Amendment, an inquiry into the Fifteenth Amendment's scope is not required.

The VRA is entitled to a broad reading because Congress has chronicled extensive state violations of the right to vote. In 1965, when first enacting the VRA, Congress documented violations of the Fifteenth Amendment, including "grandfather clauses" that permitted previously registered voters (all white) to register without taking a literacy test, laws restricting the participation in political primaries to whites only, procedural hurdles, racial gerrymandering, improper challenges, and the discriminatory use of tests. *See* H.R. Rep. No. 89-439, at 8 (1965) (citing Supreme Court decisions). Congress was particularly concerned about states' use of tests that discriminated against racial minorities, including literacy tests, constitutional interpretation tests, and tests concerning the obligations of citizenship. H.R. Rep. No. 89-439, at 12.

All of these devices worked in concert to depress the registration and turnout rate among voting-age African Americans. For example, prior to the VRA only 6.7% of the African-American voting age population in Mississippi was registered to vote. In Alabama, the registration rate of African Americans lagged behind that of whites by 49.9%. *See* S. Rep. No. 94-295, at 13 (1975), *reprinted in* 1975 U.S.C.C.A.N. 774, 779. Perhaps more problematic was the revelation that innovation in discrimination marked the landscape of voting rights. *See* S.Rep. No. 89-162, at 5 (1965); S. Rep. No. 89-439, at 10 ("Even after apparent defeat resisters seek new ways and means of discriminating. Barring one contrivance too often has caused no change in result, only in methods.") (citing *United States v. Mississippi*, 380 U.S. 128, 13 L. Ed. 2d 717, 85 S. Ct. 808 (1965), and *United States v. Penton*, 212 F. Supp. 193 (M.D. Ala. 1962)). Congress found specifically that it was impossible

to predict the variety of means that would be used to infringe on the right to vote.

In response, Congress passed the VRA, which operates on two levels. First, Congress recognized that some areas of the country had a particularly bad history of voting discrimination. Section 5 of the VRA thus designated these regions as "covered jurisdictions," requiring them to clear any changes in voting or election laws with either the Attorney General or a federal court in the District of Columbia before putting them into effect. 42 U.S.C. § 1973c. The approval of the Attorney General or the court was conditioned on a showing that the changes would not discriminate in purpose or in effect. Additionally, because Congress understood that violations of voting rights were not confined to covered jurisdictions, it included § 2, a nationwide remedy less intrusive on states' functions. *See* S. Rep. No. 97-417, at 41-42 (1982), *reprinted in* 1982 U.S.C.C.A.N. 177, 219-20.

It is of no moment that the VRA's legislative record does not contain specific examples of discrimination based on felon status. *Boerne* and its progeny require that the legislative record show a pattern of state constitutional violations, not that the right at issue be abridged in a particular way. *See Lane*, 541 U.S. at __, 124 S. Ct. at 1988-90; *Garrett*, 531 U.S. at 368-69, 121 S. Ct. at 964-65; *Kimel*, 528 U.S. at 89, 120 S. Ct. at 648-49; *Boerne*, 521 U.S. at 530, 117 S. Ct. at 2169. If this were the standard, states would always have one free bite at the apple, which is not what Congress intended when it passed the VRA to deal with voting discrimination "comprehensively and finally."

S. Rep. No. 97-417, at 5, *reprinted in* 1982 U.S.C.C.A.N. at 182.

Congress has found that racial discrimination in voting has a long history in our country. The remedy that Congress chose to respond to the pattern of state discrimination is to prohibit voting discrimination in whatever form it takes. *See Gingles*, 478 U.S. at 45 n. 10, 106 S. Ct. at 2764 n. 10 ("Section 2 prohibits all forms of voting discrimination . . . ."). This remedy is congruent and proportional to the goal of enforcing the fundamental right to vote. When voting interacts with proof of racial bias in criminal justice, Congress is well within its power to prohibit the resultant discrimination.

BARKETT, Circuit Judge, dissenting:

I dissent because I believe summary judgment was improperly granted on both plaintiffs' claims under the Equal Protection Clause of the Constitution and Section 2 of the Voting Rights Act.

I. The Equal Protection Claim

The majority frames the question presented in this case as "whether the plaintiffs have alleged facts that, if true, would be sufficient to establish *intentional* discrimination in Florida's *current* disenfranchisement law." Majority Op. at 1224 (emphasis in original). The framing of the question in this way dictates an answer that, in my view, fails to correctly analyze the equal protection claim here in the context of a summary judgment motion.

The majority and the district court simply find that because there is no evidence of intentional discrimination in the 1968 re-enactment of the relevant constitutional provision, the defendants are entitled to summary judgment. But given the nature of the plaintiffs' claim and the evidence they present, the court cannot look at the 1968 re-enactment in a vacuum. The plaintiffs contend that the original constitutional provision of 1868 (taking the evidence in the light most favorable to the plaintiffs at this stage) was passed for racially discriminatory purposes.[1] If that is so, then *United*

1. The district court found that the "plaintiffs have presented to this Court an abundance of expert testimony about the historical background of Florida's felon disenfranchisement scheme as (Cont'd)

States v. Fordice, 505 U.S. 717, 739, 120 L. Ed. 2d 575, 112 S. Ct. 2727 (1992), and *Knight v. Alabama*, 14 F.3d 1534, 1550 (11th Cir. 1994) teach us that to repudiate the tainted earlier provision, the government must show not only a lack of intentional racial discrimination in the 1968 re-enactment, but also that the re-enactment was motivated by independent, legitimate goals that "broke the chain" linking it to the original discriminatory motive. This would not require the state to explicitly address the law's odious origins, but simply articulate the non-racial policy justification that drove its re-enactment.

Where the state has not demonstrated any race-neutral basis for the re-enactment, there can be no "break" in the chain of invidious intent. *See, e.g., Fordice*, 505 U.S. at 739; *Knight*, 14 F.3d at 1550 (holding that, "once it is determined that a particular policy was originally adopted for discriminatory reasons, [and] . . . is 'traceable' to the original tainted policy, or is 'rooted' or has its 'antecedents' in that original policy" the burden of proof lies with the state to show that it has dismantled the past discrimination to "break

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historical evidence that the policy was enacted . . . with the particular discriminatory purpose of keeping blacks from voting." 214 F. Supp. 2d 1333, 1338-39 (S.D. Fla. 2002). While ultimately assuming, for the sake of summary judgment, that racial animus motivated Florida's 1868 disenfranchisement law, the majority goes to great lengths to question the sufficiency of plaintiffs' evidence and to offer alternative explanations for each historical fact that suggests a discriminatory motive. I believe that in doing so the majority erroneously views the facts and draws all reasonable inferences, not in favor of the non-moving party, but rather in favor of the state. *See Haves v. City of Miami*, 52 F.3d 918, 921 (11th Cir. 1995).

the causal chain"). Though the majority cautions that we have never followed the rule of *Fordice* outside of the educational context,[2] I believe there is no principled basis not to apply *Fordice* to a matter of equal if not greater importance—the fundamental right to participate in the democratic process. *Cf. Reynolds v. Sims*, 377 U.S. 533, 561-62, 12 L. Ed. 2d 506, 84 S. Ct. 1362 (1964) ("the right of suffrage is a fundamental matter . . . . preservative of other basic civil and political rights").

In addition to its concerns regarding the application of *Fordice* outside of the educational context, the majority holds that the rule announced in *Fordice* is inapplicable here because there are valid public policy reasons for disenfranchising felons, while no such reasons underpinned the educational policies considered in *Fordice*. Though the valid reasons recognized by the court may have driven Florida's decision to retain its felon disenfranchisement scheme, the record fails to demonstrate that those reasons in fact motivated the 1968 re-enactment. The court's attempt to distinguish *Fordice* based on the existence of a potentially valid public policy thus begs the very question of the motivation behind the 1968 re-enactment. Though valid

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2. While the majority cites to *Burton v. City of Belle Glade*, 178 F.3d 1175, 1190 (11th Cir. 1999) (finding that "appellants can point to no court that has ever applied *Fordice* outside of the education setting"), this circuit has suggested that *Fordice* applies in the employment setting, preventing public employers from escaping their constitutional obligations simply by enacting race-neutral policies that institutionalize the effects of prior discrimination. *See Ensley Branch, NAACP v. Seibels*, 31 F.3d 1548, 1575 (11th Cir. 1994).

public policies might have similarly underpinned the educational policies at issue in *Fordice*, the Court nonetheless required the state to demonstrate that those policies had a sound race-neutral educational justification.

Although the majority does not recognize the *Fordice* framework as applicable in this context, it nonetheless suggests that the record here supports a conclusion that the 1968 re-enactment was driven by race-neutral considerations because it was "deliberative." Majority Op. at 1224. There is no indication, however, in the record of deliberations that the subcommittee had any non-discriminatory reasons for re-enacting the disenfranchisement law, nor any indication that the Constitutional Revision Committee as a whole or the legislature even discussed it. While the 1968 subcommittee minutes trace the committee's procedure and its changes to the disenfranchisement provision's text, their limited nature sheds no light at all as to whether the committee was motivated by legitimate non-discriminatory reasons, or whether they saw the felon disenfranchisement provision as a legacy of previous constitutions whose justification did not need to be revisited in substance. *Cf. Richardson v. Ramirez*, 418 U.S. 24, 44, 41 L. Ed. 2d 551, 94 S. Ct. 2655 (1974) ("The Journal of that Committee's proceedings shows only what motions were made and how the various members of the Committee voted on the motions; it does not indicate the nature or content of any of the discussion in the Committee. While the Journal thus enables us to trace the evolution of the draft language in the Committee, it throws only indirect light on the intention or purpose of those who drafted § 2"). As such, while the

adjective "deliberative" describes the procedural aspects of the decision, it need not include any substantive component at all.

The record at this juncture does not permit a conclusion that the legislature's textual modifications removed the prior racial taint in any meaningful way. Where the provision explicitly disenfranchising all felons remained unchanged in substance, and without evidence that the 1968 re-enactment had an independent, legitimate motivation, the majority's conclusion that the 1968 process cleansed the taint of racial animus as a matter of law is unfounded at this stage of the proceedings. *See Fordice*, 505 U.S. at 747, 112 S.Ct. 2727 (Thomas, J., concurring) (observing that "discriminatory intent does tend to persist through time"); *Kirksey v. Bd. of Supervisors*, 554 F.2d 139, 148 (5th Cir. 1977) (*en banc*) ("[N]othing in [*Washington v. Davis* or *Arlington Heights*] suggests that, where purposeful and intentional discrimination already exists, it can be constitutionally perpetuated into the future by neutral official action."). Indeed, under the majority's rule, legislatures could continue to utilize statutes that were originally motivated by racial animus, and that continue to produce discriminatory effects, so long as they re-promulgate the statutes "deliberately" and without explicit evidence of an illicit motivation.

To conclude that the 1968 re-passage of Florida's felon disenfranchisement provision is in and of itself sufficient to "eliminate the racial taint," the majority relies on the Fifth Circuit's decision in *Cotton v. Fordice*, 157 F.3d 388 (5th Cir. 1998). The panel in *Cotton*, like the majority, fails to

analyze the claim presented in terms of the government's burden to show that a legitimate neutral reason underlaid its re-enactment of a law tainted by racial animus. However, even if I were to accept the Fifth Circuit's rule in *Cotton*, the case is distinguishable on its facts. The statute in *Cotton*, Mississippi's felon disenfranchisement law, was originally crafted to intentionally deny the vote to those convicted of so-called "black crimes," while preserving the franchise for those felons convicted of crimes thought to be committed by whites. *Cotton* holds that the legislature successfully removed the original "taint" of this discriminatory scheme by removing "black crimes" from the disenfranchising list, and successively adding murder and rape—"crimes historically excluded . . . because they were not considered 'black' crimes." *Cotton*, 157 F.3d at 391. Thus, the legislative amendment process in *Cotton* proceeded as the converse of the enactment process: the amendment removed those aspects of the law shown to be rooted in racial animus. The same cannot be said for Florida's felon disenfranchisement law. Its 1968 re-enactment resulted in only non-substantive textual changes to the statute,[3] leaving unchanged the essential

3. The 1868 provision, as amended in 1885, provided that "No person under guardianship, *non compos mentis* or insane shall be qualified to vote at any election, nor shall any person convicted of felony by a court of record be qualified to vote at any election unless restored to civil rights." Fla. Const. art. VI, § 4 (1885). Following the 1968 re-enactment process the text read, "No person convicted of a felony, or adjudicated in this or any other state to be mentally incompetent, shall be qualified to vote or hold office until restoration of civil rights or removal of disability." Fla. Const. art. VI, § 4 (1968). The 1968 changes also eliminated a provision which empowered the legislature to disenfranchise those convicted of certain (Cont'd)

feature that plaintiffs' evidence links to racial animus: Florida's disenfranchisement of all felons.

As the district court found and the majority assumes, plaintiffs' showing of racial animus in the original 1868 enactment raises a genuine issue of material fact as to whether it was adopted with a discriminatory purpose. Where the record is insufficient to conclude that either the 1968 re-enactment was motivated by legitimate concerns or that the 1868 provision would have been enacted even without racial motivations, summary judgment was improperly granted.

II. The Voting Rights Act Claim

The simple question before us is whether or not Section 2 of the Voting Rights Act ("VRA") is applicable to plaintiffs' claim that they have been denied the right to vote. As the majority states, this is not a vote dilution claim.[4] Although I

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misdemeanors. Fla. Const. art. VI, § 5 (1885). While the majority emphasizes this revision, the plaintiffs' evidence of racial intent does not hinge on or relate to the eliminated provision. Unlike the plaintiffs in *Cotton*, whose claim arose from the disenfranchisement of those committing certain "black crimes", plaintiffs' claim of racial bias relates to Florida's disenfranchisement of all felons.

4. While much of the case law interpreting Section 2 of the VRA focuses on the dilution of minority voting strength, see e.g., *Holder v. Hall*, 512 U.S. 874, 129 L. Ed. 2d 687, 114 S. Ct. 2581 (1994); *Thornburg v. Gingles*, 478 U.S. 30, 92 L.Ed.2d 25, 106 S.Ct. 2752 (1986); *Nipper v. Smith*, 39 F.3d 1494 (11th Cir. 1994) (*en banc*), we have recognized that the statute's results test, as (Cont'd)

do not know whether plaintiffs can ultimately succeed, their contention that Florida's felon disenfranchisement law effectively denies their right to vote because they are black is clearly encompassed by the plain language of the VRA, which prohibits state enforcement of any "qualification or prerequisite to voting" that "results in a denial or abridgement of the right of any citizen of the United States to vote on account of race or color . . . ." 42 U.S.C. § 1973(a) (2005); *Farrakhan v. Washington*, 338 F.3d 1009, 1016 (9th Cir. 2003), cert. denied sub nom. *Locke v. Farrakhan*, 160 L. Ed. 2d 365, 125 S. Ct. 477 (2004); *Baker v. Pataki*, 85 F.3d 919, 935-36 (2d Cir. 1996) (Feinberg, J., writing for an equally divided court)[5]; *Wesley v. Collins*, 791 F.2d 1255, 1259 (6th Cir. 1986) (considering, without analysis, a felon disenfranchisement claim brought under Section 2 of the VRA); *see also*, *Thornburg v. Gingles*, 478 U.S. 30, 45 n. 10, 92 L. Ed. 2d 25, 106 S. Ct. 2752 (1986) ("Section 2

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determined under the totality of the circumstances, applies by its terms to absolute denials of the vote. *See Burton v. City of Belle Glade*, 178 F.3d 1175, 1196 (11th Cir. 1999) ("[T]wo distinct types of discriminatory practices and procedures are covered under Section 2: those that result in 'vote denial' and those that result in 'vote dilution.'").

5. In *Baker*, an en banc panel of the Second Circuit considered whether Section 2 of the VRA applied to New York's felon disenfranchisement law. Because the panel divided equally, 5 to 5, the lower court opinion denying VRA coverage was affirmed. While the majority relies heavily on *Muntaqim v. Coombe*, 366 F.3d 102 (2d. Cir. 2004), we note that the Second Circuit has granted en banc review of *Muntaqim* and has yet to issue its decision. *See Muntaqim v. Coombe*, 396 F.3d 95 (2d Cir. 2004).

[of the VRA] prohibits all forms of voting discrimination . . . .").

The first step in statutory interpretation requires that courts apply the plain meaning of the statutory language unless it is ambiguous. *Conn. Nat'l Bank v. Germain*, 503 U.S. 249, 253, 117 L. Ed. 2d 391, 112 S. Ct. 1146 (1992); *United States v. Fisher*, 289 F.3d 1329, 1337-38 (11th Cir. 2002). Only when we find ambiguity in the statute's text do we apply canons of statutory interpretation, such as the canon of constitutional avoidance that the majority utilizes. *Dep't of Hous. & Urban Dev. v. Rucker*, 535 U.S. 125, 134, 152 L. Ed. 2d 258, 122 S. Ct. 1230 (2002). The language of Section 2 of the VRA is unambiguous, and compels a conclusion that it applies to felon disenfranchisement provisions. Such a provision is unquestionably a "voting qualification or prerequisite to voting"[6] that is "applied by [the] state." 42 U.S.C. § 1973(a) (2005). Whether or not felon disenfranchisement results in vote denial "on account of race or color" under the totality of the circumstances remains the ultimate question for the trier of fact.

Given the plain meaning of the language of Section 2, we are thus squarely faced with the issue of whether its application to felon disenfranchisement schemes is constitutional. I find no constitutional infirmity in applying

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6. *See Lassiter v. Northampton County Bd. of Elections*, 360 U.S. 45, 51, 3 L. Ed. 2d 1072, 79 S. Ct. 985 (1959) ("Residence Requirements, age, previous criminal record (*Davis v. Beason*, 133 U.S. 333, 345-47, 33 L. Ed. 637, 10 S. Ct. 299 [1890]) are obvious examples indicating factors which a State may take into consideration in determining the *qualification of voters*.") (emphasis added).

Section 2 to felon disenfranchisement statutes, and find unpersuasive the majority's argument that it impermissibly conflicts with Section 2 of the Fourteenth Amendment and raises questions about Congress' civil rights enforcement powers.

First, there is no conflict between the Constitution and the VRA. The majority's finding of a conflict between the VRA and Section 2 of the Fourteenth Amendment stems from its failure to distinguish between felon disenfranchisement laws generally and those that result in racial discrimination. Section 2 of the Fourteenth Amendment merely permits states to disenfranchise felons without suffering a reduction in congressional representation. Nothing in Section 2 of the Fourteenth Amendment grants states unfettered discretion to disenfranchise felons, much less permits felon disenfranchisement on the basis of race. *Hunter v. Underwood*, 471 U.S. 222, 233, 85 L. Ed. 2d 222, 105 S. Ct. 1916 (1985) ("[Section] 2 was not designed to permit the purposeful racial discrimination [in Alabama's criminal disenfranchisement law] . . . which otherwise violates [Section] 1 of the Fourteenth Amendment. Nothing in . . . *Richardson v. Ramirez* suggests the contrary."). Nor does Section 2 preclude Congress from legislatively addressing criminal disenfranchisement laws that have the effect of disenfranchising felons because of their race pursuant to its civil rights enforcement powers. *Baker*, 85 F.3d at 936-37 (Feinberg, J., writing for an equally divided court) (citing *City of Rome v. United States*, 446 U.S. 156, 177, 64 L. Ed. 2d 119, 100 S. Ct. 1548 (1980) (explaining that Congress can use its enforcement powers to prohibit conduct that does not itself violate the Civil War Amendments, so long as the

prohibitions on racial discrimination in voting are appropriate)). The VRA does not undermine a state's "delegated power" to disenfranchise felons, as the majority suggests. Applying the VRA's plain text would not automatically draw into question state disenfranchisement statutes in general. Rather, it would only constrain states from enacting felon disenfranchisement regimes that result in the "denial . . . of the right . . . to vote *on account of race or color*." 42 U.S.C. § 1973(a) (2005) (emphasis added). There is thus no conflict between the limited parameters that the VRA's Section 2 places on state disenfranchisement laws and the apportionment provisions found in Section 2 of the Fourteenth Amendment.

Second, the majority purports to exclude felon disenfranchisement from coverage under the VRA because of its concern over the lack of a congressional record chronicling constitutional violations stemming from state felon disenfranchisement laws. While the factual evidence of discrimination that Congress considered in enacting Section 2 did not include evidence of racially motivated felon disenfranchisement, there is no requirement that Congress make factual findings as to every potential application of a civil rights statute passed pursuant to its powers to enforce the Fourteenth and Fifteenth Amendments.[7] This is

7. Nor is Congress required to impose temporal or geographic restrictions (whose absence from Section 2 the majority finds so troubling) on statutes passed pursuant to its civil rights enforcement authority. *See, e.g., Oregon v. Mitchell*, 400 U.S. 112, 118, 27 L. Ed. 2d 272, 91 S. Ct. 260 (1970) (upholding a nationwide ban on use of literacy tests without any expiration date or geographical limit, and without congressional fact-finding on the discriminatory use of literacy tests in every state).

particularly so where Congress could not even have begun to identify every potential discriminatory voting qualification that would be subject to the VRA, given the "increasing sophistication with which the states were denying racial minorities the right to vote." *Farrakhan*, 338 F.3d at 1014; *see also* S. Rep. No. 89-439, at 10 (1965) ("[E]ven after apparent defeat, resisters seek new ways and means of discriminating. Barring one contrivance too often has caused no change in result, only in methods.").

Insofar as the majority discerns congressional intent to exclude felon disenfranchisement from coverage under Section 2 of the VRA in subsequent congressional enactments that make provisions for felon disenfranchisement, it again overlooks the distinction between felon disenfranchisement laws generally and the narrow subset of such laws that result in racial discrimination. The simple fact that Congress made provisions for felon disenfranchisement in post-VRA statutes says nothing of whether Congress intended to insulate racially discriminatory disenfranchisement schemes from attack under the VRA. Furthermore, where the majority relies on the legislative history of the "test or devices" standard found in Section 4 of the VRA to locate legislative intent as to the application of Section 2 to felon disenfranchisement, its approach overlooks the fact that because the VRA "contains a number of different provisions each with a different objective . . . the reader cannot, therefore, assume that each of the sections is designed to reach the same objective or is necessarily to be read in the same manner."[8] *United States v.*

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8. The majority's citation to *United States v. Ward*, 352 F.2d 329, 332 (5th Cir. 1965) suffers from the same infirmity. *Ward* simply

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Uvalde Consol. Indep. Sch. Dist., 625 F.2d 547, 550 (5th Cir. 1980); *see also Baker*, 85 F.3d at 939 (Feinberg, J., writing for an equally divided court) ("Because [Sections] 2 and 4 have different purposes, scope and language, the legislative history of [Section] 4(c) is not necessarily applicable to the interpretation of [Section] 2.").

Irrespective of states' authority to disenfranchise felons,[9] or the frequency with which states have historically exercised that authority, the Supreme Court has made clear that states cannot use felon disenfranchisement to intentionally discriminate on the basis of race. *Hunter*, 471 U.S. at 233. In view of *Hunter*, there can be no reason why Congress cannot act to prevent such discrimination, using its civil rights enforcement powers to reach felon disenfranchisement laws with racially discriminatory results, as it did in Section 2. *See Baker*, 85 F.3d at 938 (Feinberg, J., writing for an equally divided court); *see also Sedima, S.P.R.L. v. Imrex Co.*, 473 U.S. 479, 499, 87 L. Ed. 2d 346, 105 S. Ct. 3275 (1985) ("The fact that [a statute] has been applied in situations not expressly anticipated by Congress does not demonstrate ambiguity. It demonstrates breadth.").

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notes that disqualification for a felony conviction would not qualify as a "test or device" prohibited in those jurisdictions subject to Section 4(c) of the VRA. Nothing in Ward construes or relates to Section 2 of the VRA, much less its coverage of felon disenfranchisement laws.

9. Of course, I recognize that non-discriminatory felon disenfranchisement statutes, standing alone, raise no equal protection violation. *See Ramirez*, 418 U.S. at 54-55.

The majority's focus on the absence of congressional findings as to felon disenfranchisement, and its disregard of the statutory text, eviscerates Congress's intent to give Section 2 the "broadest possible scope." *Allen v. State Bd. of Elections*, 393 U.S. 544, 566-67, 22 L. Ed. 2d 1, 89 S. Ct. 817 (1969). More importantly, the majority's approach renders statutes passed pursuant to Congress' civil rights enforcement powers little more than stale documents, applicable only to those forms and patterns of discrimination evident at the time of passage and explicitly considered by Congress, irrespective of the breadth of the plain statutory text.

Nor does the "plain statement" rule of *Gregory v. Ashcroft*, 501 U.S. 452, 115 L. Ed. 2d 410, 111 S. Ct. 2395 (1991), which counsels the majority's avoidance approach, prevent plaintiffs from proceeding under the VRA. The canon of construction at issue in *Gregory* holds that where Congress intends to alter the "usual constitutional balance between the states and federal government," it must make its intent to do so unmistakably clear in the statute. *Id.* at 460-61 (internal citation marks omitted). As Judge Feinberg concluded in his persuasive opinion, however, the Fourteenth and Fifteenth Amendments altered the constitutional balance between the two sovereigns—not the Voting Rights Act, which merely enforces the guarantees of those amendments. *Baker*, 85 F.3d at 938 (Feinberg, J., writing for an equally divided court) (citing *City of Rome*, 446 U.S. at 179 (holding that the Civil War Amendments "were specifically designed as an expansion of federal power and an intrusion on state sovereignty")); *see also id.* at 942 (Newman, J., concurring).

Moreover, the Supreme Court has explicitly held that the *Gregory* "plain statement" canon is wholly inapplicable where the statutory language unambiguously applies to a particular state function. *Pa. Dep't of Corr. v. Yeskey*, 524 U.S. 206, 209, 141 L. Ed. 2d 215, 118 S. Ct. 1952 (1998). In *Yeskey*, the petitioners contended that under *Gregory*, state prisons were not subject to the Americans with Disabilities Act based on the lack of a "plain statement" indicating congressional intent to alter the constitutional balance by regulating state prisons. *Id.* at 208-09. The Court limited *Gregory*'s plain statement rule, holding it inapplicable because the prison fell squarely within statutory language providing for coverage of "public entities." *Id.* at 209-10. Similarly, Congress need not have included a "plain statement" on the VRA's application to criminal disenfranchisement statutes, as those statutes fall squarely within the VRA's textual prohibition on any "qualification or prerequisite to voting . . . which results in a denial or abridgement of the right of any citizen of the United States to vote on account of race or color." 42 U.S.C. § 1973(a) (2005). The only "ambiguity" the majority finds in the VRA is its "conflict" with the Fourteenth Amendment's apportionment clause. Not only does Section 2's prohibition on racially discriminatory felon disenfranchisement schemes fail to conflict with the Fourteenth Amendment, as discussed above, but such a perceived conflict is easily distinguishable from the case of ambiguity within a statute's text, which animated *Gregory*. *See Gregory*, 501 U.S. at 469-70, 111 S. Ct. 2395; *see also Salinas v. United States*, 522 U.S. 52, 60, 139 L. Ed. 2d 352, 118 S. Ct. 469 (1997) ("The plain statement requirement articulated in *Gregory* . . . does not warrant a departure from the statute's terms. The text . . . is unambiguous.").

While the majority would use this "ambiguity" to avoid the result dictated by the VRA's plain meaning and dispose of plaintiffs' claim, I would remand for determination by the trier of fact whether, under the totality of the circumstances[10], plaintiffs' votes were denied "on account of race" in violation of the VRA.

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10. Although the district court failed to examine the plaintiffs' evidence under the totality of the evidence standard that governs Section 2 claims, Judge Tjoflat's concurrence argues that a remand is unnecessary as "plaintiffs have been unable to show that whatever denial or abridgment of voting rights resulted from Florida's felon disenfranchisement provision occurred 'on account of race or color.' First, because plaintiffs are appealing the district court's grant of summary judgment, it is not necessary that they show at this stage that their votes were denied on account of race. Rather, they need only show that genuine issues of material fact remain. That, they have certainly done. As I explained in the panel opinion, as the district court wrongly excluded evidence on several of the "senate factors", plaintiffs can point to evidence on racially polarized voting, prejudice in the criminal justice system, socio-economic disparities, and a history of official discrimination. *Johnson*, 353 F.3d at 1305-06 and n. 25. This evidence goes beyond disparate impact, and when considered in the light most favorable to plaintiffs, permits a conclusion that felon status "interacts with social and historical conditions to cause an inequality in the opportunities enjoyed by black and white voters to elect their preferred representatives." *Gingles*, 478 U.S. at 47. Moreover, to the extent that Judge Tjoflat's construction of the "totality of the circumstances" inquiry imposes a requirement that plaintiffs demonstrate discriminatory intent "from somewhere in the relevant community," such a requirement appears nowhere in the pre-*Bolden* iterations of the senate factors and is inconsistent with the Congressional objective of eliminating intent from Section 2. *See Thornburg v. Gingles*, 478 U.S. 30, 35, 92 L. Ed. 2d 25, 106 S. Ct. 2752 (1986) ("[Following *Bolden*], Congress

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substantially revised § 2 to make clear that a violation could be proved by showing discriminatory effect alone and to establish as the relevant legal standard the 'results test,' applied by this Court in *White v. Regester*, 412 U.S. 755, 37 L. Ed. 2d 314, 93 S. Ct. 2332 (1973), and by other federal courts before *Bolden.*"); *Chisom v. Roemer*, 501 U.S. 380, 394, 115 L. Ed. 2d 348, 111 S. Ct. 2354 (1991) ("Under the amended statute, proof of intent is no longer required to prove a § 2 violation. Now plaintiffs can prevail under § 2 by demonstrating that a challenged election practice has resulted in the denial or abridgment of the right to vote based on color or race. Congress not only incorporated the results test in the paragraph that formerly constituted the entire § 2, but also designated that paragraph as subsection (a) and added a new subsection (b) to make clear that an application of the results test requires an inquiry into 'the totality of the circumstances.'").

ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT GRANTING PETITION FOR REHEARING EN BANC AND VACATING PREVIOUS PANEL'S OPINION, DATED JULY 20, 2004

IN THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

No. 02-14469

(D. C. Docket No. 00-03542-CV)

THOMAS JOHNSON, DERRICK ANDRE THOMAS, ERIC ROBINSON, ADAM HERNANDEZ, KATHRYN WILLIAMS-CARPENTER, JAU'DOHN HICKS, JOHN HANES, in their own right and as representatives of all ex-felon citizens of Florida,

Plaintiffs-Appellants,

OMALI YESHITELA,

Plaintiff,

versus

GOVERNOR OF THE STATE OF FLORIDA, Jeb Bush, SECRETARY OF THE STATE OF FLORIDA, Katherine Harris, CHARLIE CRIST, ROBERT MILLIGAN, WILLIAM NELSON, ROBERT CRAWFORD, THOMAS GALLAGHER, in their roles as members of the Clemency Board of Florida, BEVERLY HILL, Alachua County Election Supervisor, et al.,

Defendants-Appellees.

On Appeal from the United States District Court for the Southern District of Florida

(Opinion December 19, 2003, 353 F.3d 1287, 11th Cir. 2003)

(July 20, 2004)

Before EDMONDSON, Chief Judge, TJOFLAT, ANDERSON, BIRCH, DUBINA, BLACK, CARNES, BARKETT, HULL, WILSON and PRYOR, Circuit Judges*.

THE COURT:

A member of this Court in active service having requested a poll on the suggestion of rehearing en banc and a majority of the judges in this Court in active service having voted in favor of granting a rehearing en banc,

IT IS ORDERED that the above cause shall be reheard by this Court en banc. The previous panel's opinion is hereby VACATED.

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* Judge Stanley Marcus has recused himself and will not participate. Judge Phyllis A. Kravitch has elected to participate in further proceedings in this matter pursuant to 28 U.S.C. § 46(c).

OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT, DECIDED DECEMBER 19, 2003

UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

No. 02-14469

THOMAS JOHNSON, DERRICK ANDRE THOMAS, *et al.*, in their own right and as representatives of all ex-felon citizens of Florida,

Plaintiffs-Appellants,

OMALI YESHITELA,

Plaintiff,

v.

GOVERNOR OF the STATE OF FLORIDA, JEB BUSH, Secretary of the State of Florida, KATHERINE HARRIS, *et al.*, in their roles as members of the Clemency Board of Florida, BEVERLY HILL, Alachua County Election Supervisor, *et al.*,

Defendants-Appellees.

December 19, 2003, Decided

BARKETT, Circuit Judge:

On September 21, 2000, eight Florida citizens[1] ("the Plaintiffs") filed this class action lawsuit on behalf of all

1. Thomas Johnson, Derrick Andre Thomas, Eric Robinson, Omali Yeshitela, Adam Hernandez, Kathryn Williams-Carpenter, (Cont'd)

Florida citizens who have been convicted of a felony and successfully completed all terms of incarceration, probation, or parole, but who are still ineligible to vote under Florida's felon disenfranchisement law.[2] The Florida Constitution provides that "no person convicted of a felony . . . shall be qualified to vote or hold office until restoration of civil rights or removal of disability." Fla. Const. art. VI, § 4 (1968). The Plaintiffs sued members of Florida's Clemency Board in their official capacity[3] ("the Defendants"), alleging that this law violates the First, Fourteenth, Fifteenth, and Twenty-Fourth Amendments to the United States Constitution and Sections 2 and 10 of the Voting Rights Act of 1965, codified as amended at 42 U.S.C. § 1973 *et seq.* After excluding certain expert testimony, the district court granted summary judgment to the Defendants on all claims, and the Plaintiffs now appeal. We affirm the district court's grant of summary judgment on the Plaintiffs' poll tax claim, but, because there are disputed issues of fact to be resolved, we reverse and remand for further proceedings on the equal protection and voting rights claims.

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Jau'dohn Hicks, and John Hanes. On January 17, 2001, the district court dismissed Yeshitela as a plaintiff because his civil rights had been restored.

2. Thus, this case does not involve those persons who are still incarcerated, who are on probation or parole, or who have not completed every requirement or condition of such probation or parole.

3. The Governor of Florida and the Cabinet collectively constitute the Clemency Board, which has the power to restore civil rights, including the right to vote. *See* Fla. R. Exec. Clemency. The suit also named Florida's county supervisors of elections. Their participation has been abated pending determination of liability.

I. STANDARD OF REVIEW

We review a grant of summary judgment *de novo*, applying the same legal standards as the district court. *Info. Sys. & Networks Corp. v. City of Atlanta*, 281 F.3d 1220, 1224-25 (11th Cir. 2002). Summary judgment is appropriate only when "there is no genuine issue as to any material fact and . . . the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(c). In evaluating the argument of the moving party, the district court must view all evidence in the light most favorable to the non-moving party and resolve all reasonable doubts about the facts in its favor. *Burton v. City of Belle Glade*, 178 F.3d 1175, 1187 (11th Cir. 1999). If the record presents factual issues, or if reasonable minds might disagree about the inferences arising from the facts, then the court should deny summary judgment. *Id.* On a motion for summary judgment, the district court may not weigh evidence or find facts. *Morrison v. Amway Corp.*, 323 F.3d 920, 924 (11th Cir. 2003). We review rulings to exclude expert testimony for abuse of discretion. *McCorvey v. Baxter Healthcare Corp.*, 298 F.3d 1253, 1256 (11th Cir. 2002).

II. EQUAL PROTECTION CLAIM

Observing that Florida is one of only seven states that permanently disenfranchise first-time convicted felons unless they receive clemency, the Plaintiffs allege in their first claim on appeal that (1) the Florida Constitution's provision mandating felon disenfranchisement was adopted in 1868 with the intent to discriminate against African-American voters, (2) the intent of the 1868 framers remains operative

despite the provision's reenactment in 1968, and (3) the provision had and continues to have the discriminatory effect intended. As such, the Plaintiffs contend that the provision violates the Equal Protection Clause, which prohibits any State from "deny[ing] to any person within its jurisdiction the equal protection of the laws." U.S. Const. amend. XIV, § 1.

To decide whether a facially neutral law invidiously discriminates on the basis of race in violation of equal protection, an important factor to consider is whether its impact bears more heavily on one race than another. *See Village of Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252, 266, 50 L. Ed. 2d 450, 97 S. Ct. 555 (1977); *Washington v. Davis*, 426 U.S. 229, 242, 48 L. Ed. 2d 597, 96 S. Ct. 2040 (1976). In this case, the Plaintiffs have presented evidence that Florida's disenfranchisement of felons has a disproportionate impact on African Americans.[4] According to that evidence, Florida currently disenfranchises over 613,000 men and women on account of a prior felony conviction. Doc. 121 at 490. When Florida enacted its most recent constitution in 1968, voting-age African Americans were more than twice as likely as non-African Americans to be barred from the vote on account of a prior felony conviction. *See* Doc. 163 at Addendum. The disparity is even more pronounced today. Approximately 10.5% of voting-age

4. Because on summary judgment we must view all evidence in the light most favorable to the non-moving party and resolve all reasonable doubts about the facts in its favor, *Burton*, 178 F.3d at 1187, this opinion recounts facts as presented by the Plaintiffs unless otherwise noted. Some facts are contested, and we take no position as to which, if any, of these facts may ultimately be proved at trial.

African Americans in Florida—over 167,000 men and women—are now disenfranchised as ex-felons, compared with 4.4% of the non-African-American population. Doc. 121 at 509. More than one in six adult African-American males in Florida are disenfranchised due to a prior felony conviction. Doc. 121 at 509. Moreover, using arrest rates as a proxy for criminal involvement, the Plaintiffs have offered evidence that between 25 and 36 percent of the racial disproportionality in felony convictions—and therefore disenfranchisement due to felony convictions—cannot be explained by differential involvement in crime by race. Doc. 120 at 20-23. Thus, the Plaintiffs have presented sufficient evidence of racially disproportionate impact both in 1968 and today to support their position on this issue at summary judgment.

However, although relevant, disproportionate impact alone is not sufficient to prove invidious racial discrimination in violation of the Fourteenth Amendment. *Davis*, 426 U.S. at 242, 96 S. Ct. 2040. To prove that a facially neutral law with racially disproportionate effects violates the Equal Protection Clause, the Plaintiffs must show that racially discriminatory intent was a substantial or motivating factor behind its adoption, although it need not be the only factor. *See Arlington Heights*, 429 U.S. at 264-65 ("[Washington v. Davis] does not require a plaintiff to prove that the challenged action rested solely on racially discriminatory purposes. Rarely can it be said that a legislature or administrative body operating under a broad mandate made a decision motivated solely by a single concern, or even that a particular purpose was the 'dominant' or 'primary' one.").

The evidentiary inquiry into discriminatory motive is rarely simple: "Determining whether invidious discriminatory purpose was a motivating factor demands a sensitive inquiry into such circumstantial and direct evidence of intent as may be available." *Id.* at 266. Although a general history of past discrimination "cannot, in the manner of original sin, condemn governmental action that is not itself unlawful," *City of Mobile v. Bolden*, 446 U.S. 55, 74, 64 L. Ed. 2d 47, 100 S. Ct. 1490 (1980), the particular law's historical background is a source of probative evidence of intent. *See Arlington Heights*, 429 U.S. at 266-67. "The specific sequence of events leading up to the challenged decision also may shed some light on the decisionmaker's purposes." *Id.* at 267. Moreover, proof of discriminatory intent behind a specific policy in the past creates an inference that the impermissible purpose continues into the present, despite the passage of time and even, in some instances, intervening changes to the policy. *See Hunter v. Underwood*, 471 U.S. 222, 233, 85 L. Ed. 2d 222, 105 S. Ct. 1916 (1985) (observing that the original enactment of the Alabama Constitution's criminal disenfranchisement provision was motivated by a desire to discriminate against blacks, continues to have that effect, and therefore violates equal protection, despite intervening events that narrowed the scope of the provision).[5]

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5. *See also United States v. Fordice*, 505 U.S. 717, 747, 120 L. Ed. 2d 575, 112 S. Ct. 2727 (1992) (Thomas, J., concurring) (observing that "discriminatory intent does tend to persist through time"); *McMillan v. Escambia County*, 638 F.2d 1239, 1249 (5th Cir. 1981) ("If the system was unconstitutional in its inception and if it continues to have the effect it was designed to have, then the pure hearts of current council members are immaterial."); *Kirksey v. Bd. of Supervisors*, 554 F.2d 139, 148 (5th Cir. 1977) (*en banc*) ("Nothing in [Washington v. Davis or Arlington Heights] suggests

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With these principles in mind, we turn to the origins of Florida's current felon disenfranchisement provision. It is true that Florida's earliest constitution, ratified in 1838, empowered the legislature to disenfranchise certain criminal offenders.[6] However, the fact that the 1838 Florida

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that, where purposeful and intentional discrimination already exists, it can be constitutionally perpetuated into the future by neutral official action."); *Brown v. Bd. of Sch. Comm'rs of Mobile County*, 542 F. Supp. 1078, 1090 (S.D. Ala. 1982) (looking to the intent behind an 1876 statute, rather than its 1919 reenactment, in the absence of evidence that the latter had changed the relevant features of the election plan), *aff'd*, 706 F.2d 1103 (11th Cir. 1983) (explicitly affirming the district court on all issues), *aff'd*, 464 U.S. 807, 78 L. Ed. 2d 79, 104 S. Ct. 64 (1983); *Personnel Adm'r of Mass. v. Feeney*, 442 U.S. 256, 266, 270 n.22, 60 L. Ed. 2d 870, 99 S. Ct. 2282 (1979) (implying, in an equal protection claim, that the purpose of the current Massachusetts veterans preference law may be located in its 1896 origins despite a number of amendments, including eliminations and extensions); *Irby v. Virginia State Bd. of Elections*, 889 F.2d 1352, 1356 (4th Cir. 1989) (suggesting that the 1971 retention, with no debate, of a particular provision of the Virginia Constitution did not cleanse it of its original discriminatory intent).

6. The 1838 Constitution included two references to criminal disenfranchisement. Article VI, § 4 read:

> The General Assembly shall have power to exclude from every office of honor, trust or profit, within the State, and from the right of suffrage, all persons convicted of bribery, perjury, or other infamous crime.

Fla. Const. art. VI, § 4 (1838). Article VI, § 13 read:

> Laws shall be made by the General Assembly, to exclude from office, and from suffrage, those who shall have

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Constitution granted this power at a time when African Americans could not vote does not foreclose the Plaintiffs' claim of invidious discrimination in violation of the Equal Protection Clause. A law may be infected by discriminatory intent at any stage, including a later reenactment. *See McMillan v. Escambia County*, 638 F.2d 1239, 1246 n.14 (5th Cir. 1981).[7] Indeed, the district court found in this case that

> Plaintiffs have presented to this Court an abundance of expert testimony about the historical background of Florida's felon disenfranchisement scheme as historical evidence that the policy was enacted *originally in 1868* with the particular discriminatory purpose of keeping blacks from voting.

Johnson v. Bush, 214 F. Supp. 2d 1333, 1338-39 (S.D. Fla. 2002) (emphasis added).

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> been or may thereafter be convicted of bribery, perjury, forgery, or other high crime, or misdemeanor; and the privilege of suffrage shall be supported by laws regulating elections, and prohibiting, under adequate penalties, all undue influence thereon, from power, bribery, tumult, or other improper practices.

Fla. Const. art. VI, § 13 (1838).

7. In *Bonner v. City of Prichard*, 661 F.2d 1206, 1209 (11th Cir. 1981) (*en banc*), the Eleventh Circuit adopted as binding precedent all Fifth Circuit decisions handed down prior to the close of business on September 30, 1981.

According to the Plaintiffs' evidence, which consists primarily of the expert report and testimony of one of Florida's leading historians of Reconstruction, Dr. Jerome Shofner,[8] Florida refused to extend civil and political rights to blacks immediately following the Civil War. For example, the State denied blacks the right to vote in its 1865 constitution, rejected the Fourteenth Amendment in 1866, and established additional crimes, including a new, expansive type of larceny, in order to "address the altered condition of the colored race." Doc. 121 at 430-32.

In response, as a condition of readmission to the Union, Congress required Florida to extend voting rights regardless of race, pursuant to which Florida convened its 1868 constitutional convention. *Id.* at 433-34. Initially dominated by Radical Republicans supporting black enfranchisement, this convention first approved a constitution (1) lacking any provision disenfranchising voters on the basis of criminal convictions, (2) restricting ex-Confederate white suffrage, and (3) providing for equal population legislative districts. *Id.* at 439. Subsequently, however, a competing faction of Moderate Republicans, who sought the support of white ex-Confederate Floridians opposed to black suffrage, took control of the convention from the Radical Republicans. *Id.* at 439-40. Maintaining frequent contact with white ex-Confederate leaders, the reconstituted convention established a legislative apportionment scheme that

8. Dr. Shofner, who spent more than thirty years studying and teaching about Florida history and the Reconstruction era, has written ten books on those subjects and, additionally, has published two scholarly pieces focusing on Florida's 1868 constitutional convention. Doc. 122 at 906-07; Doc. 121 at 457.

diminished representation from densely populated black counties. It also proposed a new suffrage article automatically disenfranchising those persons convicted of infamous crimes while restoring suffrage to ex-Confederates. *Id.* at 440-41. Then, at the last moment, the delegates substituted yet another, arguably even more stringent suffrage article that (1) changed that disenfranchisement provision's scope from infamous crimes to all felonies; (2) inserted a provision, which had existed in the 1838 Constitution but had been eliminated by the Radical Republicans, granting the legislature power to disenfranchise persons convicted of bribery, perjury, and other infamous crimes; and (3) included in that enumerated list the crime of larceny, which the 1865 legislature had expanded to address the emancipation of blacks. *Id.* at 432, 441-42.

In the end, this alternative version of the constitution prevailed.[9] Shortly afterward, one of the Moderate

9. The two provisions for criminal disenfranchisement enacted in 1868 read:

> No person under guardianship *non compos mentis*, or insane, shall be qualified to vote at any election, nor shall any person convicted of felony be qualified to vote at any election unless restored to civil rights. . . .

Fla. Const. art. XIV, § 2 (1868).

> The Legislature shall have power and shall enact the necessary laws to exclude from every office of honor, power, trust, or profit, civil or military, within the State,

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Republican leaders boasted that he had kept Florida from becoming "niggerized."[10] Doc. 122 at 791, 869. One of the 1868 convention delegates also reported in 1881 that the criminal disenfranchisement provisions were being used to reduce the number of black voters, Doc. 121 at 444, an effect that the Plaintiffs argue continues to date. Based on the different versions of the constitution, the last minute amendments and vote changes, and the general historical context, Dr. Shofner concluded that intentional racial discrimination had motivated the Florida Constitution's criminal disenfranchisement provisions as passed in 1868. *See* Doc. 121 at 426-28; Doc. 142 at 3-10.

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> and from the right of suffrage, all persons convicted of bribery, perjury, larceny, or of infamous crime. . . .

Fla. Const. art. XIV, § 4 (1868). In 1885, these provisions were renumbered as article VI, §§ 4 and 5, respectively, but the language remained largely unchanged except for the addition of "by a court of record" to the new § 4.

10. There is no evidence in the record that this boast referred specifically to the 1868 Constitution's criminal disenfranchisement provisions. But taking the evidence we do have in the light most favorable to the Plaintiffs, a reasonable fact-finder could conclude that in 1868, certain political factions did whatever they could to prevent African Americans from being able to vote, including inserting both the better-known discriminatory voter apportionment and appointment provisions as well as the lesser-known criminal disenfranchisement provisions into the constitution with the intent to achieve that goal. It is at least as likely that the 1872 boast referred to the whole 1868 Constitution, including criminal disenfranchisement, as that it was limited only to the other, more obviously discriminatory provisions.

Accepting the Plaintiffs' evidence, a reasonable fact-finder could conclude that the discriminatory animus behind the felon disenfranchisement provision's 1868 adoption satisfies the Plaintiffs' initial burden of showing that race was a substantial or motivating factor behind the constitutional provision here challenged. *Arlington Heights*, 429 U.S. at 266. Once the Plaintiffs have made this threshold showing, "the burden shifts to Appellees to prove that, *at the time of the discriminatory act*, the same decision would have been made for a legitimate reason." *Burton*, 178 F.3d at 1189 (citing *Mount Healthy City Sch. Dist. Bd. of Educ. v. Doyle*, 429 U.S. 274, 287, 50 L. Ed. 2d 471, 97 S. Ct. 568 (1977)) (emphasis added). The summary judgment record here does not, however, establish that the Defendants have shown as a matter of law that the constitutional convention would have passed the felon disenfranchisement provision in 1868 absent a racially impermissible purpose. Thus, were the 1868 Constitution Florida's most recent, our present inquiry could end here. The case would be controlled directly by the Supreme Court's unanimous opinion in *Hunter v. Underwood*, 471 U.S. 222, 85 L. Ed. 2d 222, 105 S. Ct. 1916 (1985), which found that the Alabama Constitution's criminal disenfranchisement provision, passed in 1901, was motivated by racially discriminatory intent, would not have been enacted at that time without the racially discriminatory intent, and therefore violated the Equal Protection Clause.

However, Florida ratified a new constitution in 1968. Although the provision explicitly disenfranchising all felons remained substantively unchanged, the 1968 Constitutional Revision Committee did make certain textual modifications.

As amended in 1885, the felon disenfranchisement provision had read:

> No person under guardianship, *non compos mentis* or insane shall be qualified to vote at any election, nor shall any person convicted of felony by a court of record be qualified to vote at any election unless restored to civil rights.

Fla. Const. art. VI, § 2 (1885). After the 1968 revision, the provision reads:

> No person convicted of a felony, or adjudicated in this or any other state to be mentally incompetent, shall be qualified to vote or hold office until restoration of civil rights or removal of disability.

Fla. Const. art. VI, § 4 (1968).[11] The summary judgment record reflects no evidence that racial considerations were discussed by the participants in the 1968 constitutional revision process when they passed the felon disenfranchisement provision. Thus,

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11. The 1968 Constitution also deleted the provision that had read:

> The Legislature shall have power to, and shall, enact the necessary laws to exclude from every office of honor, power, trust or profit, civil or military, within the State, and from the right of suffrage, all persons convicted of bribery, perjury, larceny, or of infamous crime. . . .

Fla. Const. art. VI, § 5 (1885).

had the 1968 provision been Florida's first enactment of such a felon disenfranchisement rule, our analysis would look first to the Supreme Court's opinion in *Richardson v. Ramirez*, 418 U.S. 24, 41 L. Ed. 2d 551, 94 S. Ct. 2655 (1974), which held that felon disenfranchisement laws are not *per se* unconstitutional.

This case, however, fits neither the *Hunter* nor the *Richardson* model. The 1868 convention did not have the final word on the disenfranchisement provision. Nor did the provision originate in 1968. Thus, accepting as true that the provision's purpose in 1868 included impermissible intentional racial discrimination, we must consider the legal effect to be accorded the retention of this provision in 1968.

The Plaintiffs argue that when discriminatory intent motivated a prior enactment, the State bears the burden of showing that, to avoid perpetuating the impermissible purpose, the later reenactment had a legitimate, non-discriminatory basis. The Defendants counter that the State bears no burden and, moreover, that the original provision has no legal effect in light of a later reenactment.

Although neither this Court nor the Supreme Court has yet confronted this question in the context of felon disenfranchisement, courts have considered the legal effect of race-neutral policies that serve to perpetuate intentional racial discrimination in other contexts. For example, courts have considered equal protection challenges when asserted to invalidate laws, policies, and practices arising from a history of *de jure* segregation. In these cases, when original discriminatory intent has been demonstrated, the State has

been required to show that the original taint has been purged and even, in some circumstances, that the State has taken affirmative steps to remove the effects of the discrimination.[12]

Specifically, in holding that States have an affirmative duty to dismantle the vestiges of past *de jure* segregation in higher education, the Supreme Court concluded that the State of Mississippi had not satisfied its constitutional burden through "the adoption and implementation of race-neutral policies alone," *United States v. Fordice*, 505 U.S. 717, 729, 120 L. Ed. 2d 575, 112 S. Ct. 2727 (1992), because such policies did not stem the effects of the past discrimination and less segregative alternatives existed. *See id.* at 743. Linking intent to the State's burden, Justice Thomas further observed in *Fordice* that,

> given an initially tainted policy, it is eminently reasonable to make the State bear the risk of

12. *See, e.g., Fordice*, 505 U.S. at 728; *Dayton Bd. of Educ. v. Brinkman*, 443 U.S. 526, 537-38, 61 L. Ed. 2d 720, 99 S. Ct. 2971 (1979) (noting the "affirmative duty [to desegregate] imposed by our cases" and stating that "given intentionally segregated schools in 1954, . . . the Board [of Education] was thereafter under a continuing duty to eradicate the effects of that system"); *Columbus Bd. of Educ. v. Penick*, 443 U.S. 449, 458, 61 L. Ed. 2d 666, 99 S. Ct. 2941 (1979) (stating that once official segregation has been shown, "under the Fourteenth Amendment and the cases that have construed it, the Board [of Education]'s duty to dismantle its dual system cannot be gainsaid"); *Green v. County Sch. Bd. of New Kent County*, 391 U.S. 430, 437, 20 L. Ed. 2d 716, 88 S. Ct. 1689 (1968) (holding that a Virginia school board did not meet its affirmative burden to "take[ ] steps adequate to abolish" its past *de jure* racial segregation when it adopted a facially race-neutral policy of school choice, because it was ineffective in accomplishing *actual* desegregation).

> nonpersuasion with respect to intent at some future time, both because the State has created the dispute through its own prior unlawful conduct, and because discriminatory intent does tend to persist through time. . . . Thus, if a policy remains in force, without adequate justification and despite tainted roots and segregative effect, it appears clear—clear enough to presume conclusively—that the State has failed to disprove discriminatory intent.

Id. at 747 (Thomas, J., concurring).

Applying the standards articulated in *Fordice* to hold that Alabama had also not met its constitutional obligation with respect to its prior *de jure* segregated university system, this Circuit made clear in *Knight v. Alabama*, 14 F.3d 1534 (11th Cir. 1994), that "once it is determined that a particular policy was originally adopted for discriminatory reasons, the *Fordice* test inquires whether the current policy is 'traceable' to the original tainted policy, or is 'rooted' or has its 'antecedents' in that original policy." *Id.* at 1550. When that is established, the burden of proof lies with the State to show that it has dismantled the past discrimination "root and branch." *Id.* at 1540, 1552 (quotation omitted); *see also Fordice*, 505 U.S. at 731 ("If the State perpetuates policies and practices traceable to its prior system that continue to have segregative effects . . . the State has not satisfied its burden of proving that it has dismantled its prior system."). In *Knight*, drawing heavily on the "causation principles articulated in *Fordice*," we therefore framed our analysis of facially race-neutral policies enacted against an originally discriminatory backdrop in terms of "breaking the causal chain." *Knight*, 14 F.3d at 1550.

These cases required the State to dismantle a prior discriminatory education system by eradicating its effects. While their particular remedies might not be completely applicable here, we do derive guidance from their rationale, which demands that the State demonstrate a break in the causal chain of discrimination to assure compliance with the Equal Protection Clause. Surely if a State has an affirmative duty to dismantle the vestiges of past *de jure* segregation in the education context, it must bear some burden when the right to vote—a citizen's most basic right in a democracy—has been impermissibly abrogated.[13] At a minimum, as Justice Thomas noted, once the State has impermissibly

13. *Cf. Reynolds v. Sims*, 377 U.S. 533, 562, 12 L. Ed. 2d 506, 84 S. Ct. 1362 (1964) ("The right to exercise the franchise in a free and unimpaired manner is preservative of other basic civil and political rights."). The dissent insists that felon disenfranchisement and higher education should be subject to different standards of review because Mississippi had no valid educational justification for maintaining segregated schools. However, the Plaintiffs allege that Florida intended to categorize voters on the basis of race, not criminal activity. Just as there is no constitutionally legitimate reason to segregate schools on the basis of race, even if the facially neutral policies used to maintain such segregation—such as school choice programs or admissions standards—might also have non-racial justifications, there is no constitutionally legitimate reason to deny the right to vote to felons or anyone else on the basis of race. Additionally, although felon disenfranchisement does not apply only to African Americans, racially discriminatory policies can be deliberately over-inclusive. Poll taxes, for example, surely disenfranchised some whites as well as blacks even though they were discriminatorily intended to impact blacks. It is impermissible to have an over-inclusive felon disenfranchisement law intended to keep blacks from voting, even if it keeps certain white convicted criminals away from the polls as well. *See also infra* note 23.

discriminated on the basis of race through a particular law and continuing discriminatory effects have been established, then the State must disavow any connection to the law's original discriminatory purpose by showing that it was later reenacted for independent, non-discriminatory reasons.

The application of this principle in discrimination law appropriately draws on fundamental principles of causation and intent prevalent throughout the legal system. In both criminal law and the law of torts, for example, the legal effects of a wrongful action are held to reach through subsequent events to encompass remote but foreseeable harms. *See, e.g., Palsgraf v. Long Island R.R.*, 248 N.Y. 339, 162 N.E. 99 (N.Y. 1928); *United States v. Hayes*, 589 F.2d 811, 821 (5th Cir. 1979). As evidenced in *Knight*, this principle of legal causation is often conceptualized by reference to a metaphorical "chain of causation" that links events through time. *See, e.g., United States v. Rodriguez*, 279 F.3d 947, 952 (11th Cir. 2002). Though it generally stretches intact and inertially between events, the causal chain may be severed by a sufficiently independent intervening action.[14] This concept of a "new intervening action," rooted in common sense, is frequently used by courts to analyze whether events that occur subsequent to an initial action operate to break the causal chain. *See, e.g., Malley v. Briggs*, 475 U.S. 335, 344 n.7, 89 L. Ed. 2d 271, 106 S. Ct. 1092 (1986) (recognizing the causal chain between an application for a warrant and an improvident arrest because "§ 1983 should be read against the background of tort liability that

14. This concept is captured by the traditional doctrine of *novus actus interveniens*. *See, e.g.*, H.L.A. Hart & A.M. Honoré, Causation in the Law 73-74 (1985).

makes a man responsible for the natural consequences of his actions"); *United States v. Waksal*, 709 F.2d 653, 663 (11th Cir. 1983) ("No significant intervening event purged the taint of the illegal restraint on appellant's liberty."); *United States v. Cantu*, 230 F.3d 148, 158 (5th Cir. 2000) (King, J., concurring) (examining "whether there were any intervening circumstances sufficient to break the causal chain thus dissipating the taint of the initial illegality") (internal quotations omitted).

A new action or event is only considered to be sufficiently "intervening" if it is made freely, deliberately, and knowledgeably. *See, e.g.*, Hart & Honoré, *Causation in the Law* at 136. Thus, the actions of uninformed agents who unwittingly further the principal's purposes are generally deemed inadequate to break the causal chain. *Cf. Rodriguez*, 279 F.3d at 952 (noting that it is a "basic principle of criminal law that foreseeable negligent acts of a third party do not sever the chain of causation"); Rest. (2d) Torts § 452 (stating that a third person's failure to prevent harm is not a superceding cause of the harm). In contrast, the exercise of independent judgment by a later actor may suffice to sever the connection to the original wrongful action. *See, e.g.*, *Townes v. City of New York*, 176 F.3d 138, 147 (2d Cir. 1999) ("It is well settled that the chain of causation between a police officer's unlawful arrest and a subsequent conviction and incarceration is broken by the intervening exercise of independent judgment."); *Hand v. Gary*, 838 F.2d 1420, 1427-28 (5th Cir. 1988) (stating that presenting all facts to an independent intermediary will break a chain of causation, while misdirecting the intermediary "by omission or commission perpetuates the taint of the original official

behavior"). Applied in the context of an originally discriminatory legislative action, these principles direct us to consider whether a subsequent reenactment was made with sufficient knowledge and purpose to be deemed a new intervening event, thereby breaking the chain of invidious intent.

In *Hunter*, the Supreme Court looked to the original intent and found that certain intervening events were insufficient to break the causal chain of discrimination. In that case, the Court held that a criminal disenfranchisement law is unconstitutional if "its original enactment was motivated by a desire to discriminate against blacks on account of race and the [law] continues to this day to have that effect." 471 U.S. at 233. In so holding, the Court rejected Alabama's argument that its current interest in disenfranchising certain criminal offenders legitimated its originally discriminatory disenfranchisement provision. Rather than accept a non-discriminatory justification post hoc, the Court focused on the State's original intent, observing that "such a [legitimate] purpose simply was not a motivating factor of the 1901 convention." *Id.* at 232.

The *Hunter* Court further noted that:

> At oral argument in this Court, the appellants' counsel suggested that, regardless of the original purpose of § 182, events occurring in the succeeding 80 years had legitimated the provision. Some of the more blatantly discriminatory selections, such as assault and battery on the wife and miscegenation, have been struck down by the

> courts, and appellants contend that the remaining crimes—felonies and moral turpitude misdemeanors —are acceptable bases for denying the franchise. Without deciding whether § 182 would be valid if enacted today without any impermissible motivation, we simply observe that its original enactment was motivated by a desire to discriminate against blacks on account of race and the section continues to this day to have that effect. As such, it violates equal protection under *Arlington Heights*.

Id. at 233 (emphasis added). In *Cotton v. Fordice*, 157 F.3d 388, 391 (5th Cir. 1998), the Fifth Circuit relied upon this statement to conclude that *Hunter* "left open the possibility that by amendment, a facially neutral provision . . . might overcome its odious origin."[15] On that basis, the Fifth Circuit upheld, despite its discriminatory origin, a criminal disenfranchisement provision subsequently reenacted with modifications by the State of Mississippi. While we agree that *Hunter* left open the possibility that reenactment may be sufficient *in some circumstances* to "break the causal chain," *Knight*, 14 F.3d at 1550, we disagree with the Fifth Circuit's failure to consider whether such reenactment must be accompanied by an independent, non-discriminatory purpose.

Based on all of the foregoing, we conclude that an original discriminatory purpose behind Florida's felon

15. With its language, the *Hunter* Court left equally open the converse possibility that prior discriminatory purpose could be perpetuated through an amendment enacted pursuant to a non-discriminatory legislative process.

disenfranchisement provision establishes an equal protection violation that persists with the provision unless it is subsequently reenacted on the basis of an independent, non-discriminatory purpose. Thus, if an impermissible discriminatory intent is found to be a motivating factor behind the 1868 enactment of the provision, and the Defendants do not show that it would have been enacted at that time absent the impermissible discriminatory intent, the Defendants have the burden to show that the State knowingly and deliberately reenacted it for a non-discriminatory reason.

At this stage of the proceedings, when viewed in the light most favorable to the Plaintiffs, the record before the district court does not show that the 1968 Constitution gave effect to an independent, non-discriminatory purpose in keeping the felon disenfranchisement provision.[16] Although

16. The dissent implies that Florida had a legitimate policy reason in 1968 for continuing to disenfranchise felons. We find no evidence in the summary judgment record of such a legitimate motive in 1968. Although a few courts have suggested non-racially discriminatory public policy rationales for disenfranchising felons, *see Green v. Bd. of Elections*, 380 F.2d 445, 451 (2d Cir. 1967); *Washington v. State*, 75 Ala. 582, 585 (1884), others have questioned those rationales. *See, e.g., Richardson*, 418 U.S. at 79-82 (Marshall, J., dissenting); *Farrakhan v. Locke*, 987 F. Supp. 1304, 1312 (E.D. Wash. 1997); *Stephens v. Yeomans*, 327 F. Supp. 1182, 1188 (D.N.J. 1970). *See also* Afi S. Johnson-Parris, *Note: Felon Disenfranchisement: The Unconscionable Social Contract Breached*, 89 Va. L. Rev. 109 (2003); Alec C. Ewald, *"Civil Death": The Ideological Paradox of Criminal Disenfranchisement Law in the United States*, 2002 Wisc. L. Rev. 1045 (2002); Note, *The Disenfranchisement of Ex-Felons: Citizenship, Criminality, and "The*

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the record reflects that the five-person Subcommittee on Suffrage and Elections "discussed" the provision at one of its twelve meetings, there is no evidence regarding the substance of that discussion nor that the Constitutional Revision Committee as a whole or the legislature ever discussed the provision.[17] While it is possible to speculate

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Purity of the Ballot Box," 102 Harv. L. Rev. 1300 (1989) (all challenging the validity and/or constitutionality of the assumptions behind those rationales). Moreover, the United States appears unique in the world community in the manner in which it permits felon and ex-felon disenfranchisement. *See* Jamie Fellner & Marc Mauer, *Losing the Right to Vote: The Impact of Felon Disenfranchisement Laws*, The Sentencing Project & Human Rights Watch Report (Oct.1998), http:// www.hrw.org/reports98/vote/usvot98o-04.htm# 0112_273. For example, Canada recently declared its prisoner disenfranchisement statute unconstitutional, regarding the law as a violation of a fundamental democratic right. *See Suavé v. Canada (Chief Electoral Officer)*, 2002 S.C.C.D.J. 2883 (Oct. 31, 2002). In any case, the debate over the soundness of felon disenfranchisement or its rationales is irrelevant in the absence of any evidence that the framers of the 1968 Florida Constitution considered any such independent, non-discriminatory reasons for retaining felon disenfranchisement. *Cf. Hunter*, 471 U.S. at 232 (rejecting Alabama's argument that it had a legitimate interest in its criminal disenfranchisement law because that interest was not shown to be a motivating factor in 1901).

17. The relevant portion of the Subcommittee minutes reads as follows:

> Mr. Earle moved that Article VI, Section 4 be adopted by the Committee on Suffrage and Elections. The motion was seconded.

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Mr. Pettigrew moved to amend Mr. Earle's motion by striking "judicially determined to be of unsound mind, or under judicial guardianship because of mental disability" and to substitute therefor "persons adjudicated mentally incompetent." This motion was seconded and passed.

Mr. Pettigrew moved to further amend Section 4 by adding to his previous amendment: "in this or any other state and who have not had their competency judicially restored." This amendment was seconded and also passed.

After considerable discussion, Mr. Pettigrew moved that Section 4 be deleted and the following inserted: "The Legislature may by law establish disqualifications for voting for mental incompetency or conviction of a felony." The motion was seconded.

Mr. Goodrich offered the following substitute motion to Mr. Pettigrew's motion: Delete Section 4 and insert: "The Legislature may by law exclude persons from voting because of mental incompetence or commitment to a jail or penal institution." After discussion, Mr. Goorich's [sic] motion failed for lack of a second.

The vote was taken on Mr. Pettigrew's motion, but it failed adoption.

Mr. Goodrich moved that the word "felony" in line 2 of Section 4 be changed to "crime." The motion failed for lack of a second.

The Committee adopted Section 4 of Article VI with no further amendments.

Minutes of the Suffrage and Elections Committee of the Florida Constitution Revision Commission, Feb. 2-3, 1966, at 6-7.

from the minutes that Subcommittee members discussed non-discriminatory reasons for disenfranchising felons, one could equally conclude that the Subcommittee regarded the felon disenfranchisement provision as a legacy of previous constitutions that did not need to be revisited in substance.[18] Retaining an originally discriminatory provision in order to preserve continuity, or out of deference to tradition, or simply due to inertia does not amount to an independent purpose sufficient to break the chain of causation between the original racial animus and the provision's continuing force as law. Thus, if the 1968 constitutional drafters kept a long-standing provision essentially intact for any of these reasons, then the discriminatory animus of which that provision was born, if ultimately proved as a matter of fact, would suffice to establish unconstitutional racial discrimination in violation of the Fourteenth Amendment.

Accordingly, because the Plaintiffs' showing of racial animus in the 1868 provision creates a genuine issue of material fact as to whether it was adopted with a discriminatory purpose, and because on this record the Defendants have not met their burden of showing that this provision was reenacted in 1968 with an independent, non-discriminatory purpose, summary judgment was improperly

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18. *Cf. Richardson*, 418 U.S. at 44 ("The Journal of that Committee's proceedings shows only what motions were made and how the various members of the Committee voted on the motions; it does not indicate the nature or content of any of the discussion in the Committee. While the Journal thus enables us to trace the evolution of the draft language in the Committee, it throws only indirect light on the intention or purpose of those who drafted § 2.").

granted. We therefore reverse and remand to the district court for further proceedings on the equal protection claim.[19]

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19. On remand, the parties shall be given the opportunity to engage in additional discovery to address any other evidence pertaining to the motivations behind the passage of the felon disenfranchisement provision in 1868 and 1968. An assessment of the drafters' purposes would, among other things, look to the historical context in which the provision was considered, the discussions held at that time, and the changes effectuated. *See Arlington Heights*, 429 U.S. at 266-67. Eliminating only one part of an odious provision while maintaining other parts that continue to have racially discriminatory effects, for example, might perpetuate rather than eliminate the taint. *Cf. Hunter*, 471 U.S. at 233 (narrowing changes by the courts to Alabama's criminal disenfranchisement law did not cure the equal protection violation).

In addition, we find meritorious the Plaintiffs' claim that evidence from their expert Richard Scher should be considered as well. Although the district court originally granted the Defendants' motion *in limine* to exclude Scher's evidence because it would not be helpful to the trier of fact, both parties at summary judgment relied on Scher's expert report and testimony for almost all of their evidence as to the 1968 constitutional revision process. Moreover, the district court cited to Scher's evidence in the order granting summary judgment. *See Johnson v. Bush*, 214 F. Supp. 2d 1333, 1339 (S.D. Fla. 2002). We also observe that Scher's proposed testimony about the 1968 constitutional revision process, drawing upon his specialized knowledge of information located in archives in Tallahassee, sheds light on the sensitive factual inquiry into discriminatory intent, *see Arlington Heights*, 429 U.S. at 266, 268, an inquiry distinct from the practice, familiar to courts and lawyers, of using legislative history to discern the intent of the legislature as it bears on a law's meaning.

III. VOTING RIGHTS CLAIM

Section 2 of the Voting Rights Act of 1965, 42 U.S.C. § 1973, as amended, prohibits the use of any "voting qualification or prerequisite to voting or standard, practice, or procedure . . . which results in a denial or abridgement of the right of any citizen of the United States to vote on account of race or color." 42 U.S.C. § 1973(a).[20] In 1982, Congress amended the Act to provide explicitly that a violation of Section 2

> is established if, based on the totality of circumstances, it is shown that the political processes leading to nomination or election in the State or political subdivision are not equally open to participation by members of a class of citizens protected by subsection (a) in that its members have less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice.

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20. The full text of subsection (a) states:

> No voting qualification or prerequisite to voting or standard, practice, or procedure shall be imposed or applied by any State or political subdivision in a manner which results in a denial or abridgement of the right of any citizen of the United States to vote on account of race or color, or in contravention of the guarantees set forth in section 4(f)(2) [42 U.S.C. § 1973b(f)(2)], as provided in subsection (b).

42 U.S.C. § 1973(a).

> The extent to which members of a protected class have been elected to office in the State or political subdivision is one circumstance which may be considered: *Provided*, That nothing in this section establishes a right to have members of a protected class elected in numbers equal to their proportion in the population.

42 U.S.C. § 1973(b).

The 1982 amendments were passed in response to the Supreme Court's opinion in *City of Mobile v. Bolden*, 446 U.S. 55, 64 L. Ed. 2d 47, 100 S. Ct. 1490 (1980), which held that proof of intentional discrimination was necessary to establish violations of both the Fifteenth Amendment and Section 2 of the Voting Rights Act. The 1982 amendments instead established a "results" test "to make clear that proof of discriminatory intent is not required to establish a violation of Section 2." S. Rep. No. 97-417, at 2 (1982), *reprinted in* 1982 U.S.C.C.A.N. 177, 179; *see also United States v. Marengo County Comm'n*, 731 F.2d 1546, 1557 (11th Cir. 1984) (describing the enactment of the 1982 amendments).

The new subsection (b) "provides that the issue to be decided under the results test is whether the political processes are equally open to minority voters." S. Rep. at 2. In explaining the amended standard, the 1982 Senate Judiciary Committee majority report lays out a broad, non-exclusive list of factors to consider ("the Senate factors"), which include any history of voting-related official discrimination, the extent to which minority group members bear the effects of discrimination in other areas which hinder

their ability to participate effectively in the political process, and the extent to which the State has used voting practices that tend to enhance the opportunity to discriminate against the minority group.[21] *Id.* at 28-29.

Guided by the relevant Senate factors, courts must then evaluate a Section 2 claim "based on the totality of circumstances." 42 U.S.C. § 1973(b). In other words, "[t]he essence of a § 2 claim is that a certain electoral law, practice, or structure interacts with social and historical conditions to cause an inequality in the opportunities enjoyed by black and white voters to elect their preferred representatives." *Thornburg v. Gingles*, 478 U.S. 30, 47, 92 L. Ed. 2d 25, 106 S. Ct. 2752 (1986).[22] Although different factors have varying

21. The enumerated Senate factors also include the extent of racially polarized voting, the exclusion of minority group members from candidate slating processes, the use of racial appeals in political campaigns, the extent to which members of the minority group have been elected to public office in the jurisdiction, the tenuousness of the State's interest in the particular practice, and evidence that elected officials are unresponsive to the needs of minority group members. S. Rep. at 28-29.

22. Although much of the legislative history of Section 2 and most of the cases focus on the abridgement of the right to vote by dilution of minority voting strength, *see, e.g.*, S. Rep. at 29-31; H.R.Rep. No. 97-227, at 18, 30 (1981); *Holder v. Hall*, 512 U.S. 874, 129 L. Ed. 2d 687, 114 S. Ct. 2581 (1994); *Thornburg v. Gingles*, 478 U.S. 30, 92 L. Ed. 2d 25, 106 S. Ct. 2752 (1986); *Nipper v. Smith*, 39 F.3d 1494 (11th Cir. 1994) (*en banc*); *Solomon v. Liberty County*, 899 F.2d 1012 (11th Cir. 1990) (*en banc*); *see also* Frank R. Parker, *The "Results" Test of Section 2 of the Voting Rights Act:*

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relevance depending on the particular practice at issue, *see* S. Rep. at 28, it is clear that a proper examination cannot focus solely on one explanation for the vote denial or abridgement but must involve a "searching practical evaluation of the past and present reality" of the challenged voting structure, *Gingles*, 478 U.S. at 45, and its interaction with social and historical conditions, *id.* at 47 n.8, including the "searching and meaningful evaluation of *all* the relevant evidence." *Southern Christian Leadership Conference of Ala. v. Sessions*, 56 F.3d 1281, 1293 (11th Cir. 1995) (*en banc*). Each situation is particular, and as a result, each inquiry is fact-intensive. *See Gingles*, 478 U.S. at 79 ("This determination is peculiarly dependent upon the facts of each case, and requires an intensely local appraisal of the design

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Abandoning the Intent Standard, 69 Va. L. Rev. 715, 762 (1983), the statute's "results test"—as determined by the totality of the circumstances—also applies by its plain language to claims of absolute denial of the vote. *See* 42 U.S.C. § 1973; *see also* S. Rep. at 30 ("Section 2 remains the major statutory prohibition of all voting rights discrimination."). We have not yet explicated the meaning of the results test in the context of a vote denial claim, but this Court has explicitly recognized the applicability of the totality of the circumstances inquiry and implicitly accepted the relevance of some of the evidence described by the "Senate factors." *See Burton*, 178 F.3d at 1197-98; *see also Farrakhan v. Washington*, 338 F.3d 1009, 1015 n. 11 (9th Cir. 2003) ("*Farrakhan III*") ("We have held that the totality of the circumstances approach applies to both vote dilution and vote denial claims."); *Mississippi State Chapter, Operation PUSH v. Allain*, 674 F. Supp. 1245, 1263 (N.D. Miss. 1987) ("While the Committee report makes reference to dilution, the court is of the opinion that the same language and analysis is applicable to this voter registration case.").

and impact of the contested electoral mechanisms.") (internal citations omitted).

In this case, the Plaintiffs challenge the adverse summary judgment on their Section 2 vote denial claim, arguing that the district court erred by failing to consider the evidence they presented in accordance with the totality of the circumstances standard delineated above. We agree. In granting summary judgment, the district court simply concluded that "it is not racial discrimination that deprives felons, black or white, of their right to vote but their own decision to commit an act for which they assume the risks of detection and punishment." *Johnson*, 214 F. Supp. 2d at 1341. This conclusion, however, only begs the question. The proper question here is whether felon status "interacts with social and historical conditions to cause an inequality in the opportunities enjoyed by black and white voters to elect their preferred representatives."[23] *Gingles*, 478 U.S. at 47. Indeed,

23. Similarly, in other cases, otherwise neutral categories or classifications have interacted with social and historical conditions so as to function as proxies for race. For example, a literacy test, by itself a constitutional race-neutral voting qualification, may violate the Voting Rights Act when it is used to deny African Americans the right to vote, *see South Carolina v. Katzenbach*, 383 U.S. 301, 333-34, 15 L. Ed. 2d 769, 86 S. Ct. 803 (1966) (upholding the Voting Rights Act's ban on literacy tests although a facially fair literacy test is not *per se* unconstitutional). In addition, facially race-neutral poll taxes and grandfather clauses have been declared unconstitutional when used as proxies to deny African Americans the franchise. *See Guinn v. United States*, 238 U.S. 347, 364- 67, 59 L.Ed. 1340, 35 S. Ct. 926 (1915) (striking down exemption from literacy tests for any "person who was, on January 1, 1866, or any

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in *Hunter*, the Supreme Court found that Alabama's criminal disenfranchisement law could not constitutionally be used as a tool for discrimination on the basis of race, even though the plaintiffs had been convicted of crimes.[24] Thus, the fact that the Plaintiffs have been convicted of crimes "was not a bar to the plaintiffs claims in *Hunter v. Underwood*, and should play no different role in the case at hand." *Farrakhan v. Locke*, 987 F. Supp. 1304, 1313 (E.D. Wash. 1997) ("*Farrakhan I*"), *aff'd by Farrakhan v. Washington*, 338 F.3d 1009, 1016 (9th Cir. 2003) ("*Farrakhan III*") (agreeing that disenfranchised felons may state a claim of vote denial under Section 2 of the Voting Rights Act). We therefore find that the district court erred by relying at summary judgment solely

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time prior thereto, entitled to vote . . . and [any] lineal descendant of such person" because "the standard itself inherently brings [a racially exclusionary] result into existence"); *United States v. Alabama*, 252 F. Supp. 95 (M.D. Ala. 1966) (three-judge district court) (finding Alabama's poll tax unconstitutional because its purpose and effect was to discriminate on the basis of race).

24. In reaching its conclusion, the district court relied in part on the Sixth Circuit's opinion in *Wesley v. Collins*, 791 F.2d 1255 (6th Cir. 1986), *aff'g* 605 F. Supp. 802, 813 (M.D. Tenn. 1985). However, *Wesley* failed to adequately consider the Supreme Court's approach to racially discriminatory disenfranchisement, noting erroneously that "the disenfranchisement of felons has never been viewed as a device by which a state could discriminatorily exclude a given racial minority from the polls." *Wesley*, 791 F.2d at 1262 (affirming the trial court's conclusion that disenfranchising felons has never been linked to discriminatory attempts to prevent racial minorities from voting, despite *Hunter*'s holding the previous year). *See also Baker v. Pataki*, 85 F.3d 919, 940 n.10 (2d Cir. 1996) (in banc) (Feinberg, J., concurring) (rejecting *Wesley*'s conclusions).

on the fact of the Plaintiffs' criminal convictions rather than looking to the totality of the circumstances.

In addition, the district court relied on the Eastern District of Washington's opinion in *Farrakhan v. Locke*, No. 96-0076, 2000 U.S. Dist. LEXIS 22212 (E.D. Wash. 2000) ("*Farrakhan II*"), which granted summary judgment on the basis that discrimination in the criminal justice system was insufficient to establish that Washington's felon disenfranchisement law violated Section 2 of the Voting Rights Act. That case, however, was reversed, and the appellate court concluded that

> [t]o the extent that racial bias and discrimination in the criminal justice system contribute to the conviction of minorities . . . , such discrimination would clearly hinder the ability of racial minorities to participate effectively in the political process, as disenfranchisement is automatic. Thus, racial bias in the criminal justice system may very well interact with voter disqualifications to create the kind of barriers to political participation on account of race that are prohibited by Section 2, rendering it simply another relevant social and historical condition to be considered where appropriate.

Farrakhan III, 338 F.3d at 1020. We agree with this analysis and conclude that the district court erred in disregarding the Plaintiffs' evidence of discrimination in the criminal justice

system at the summary judgment stage. The weight due to this evidence is a disputed question for the fact-finder at trial.[25]

Finally, we note that the Plaintiffs presented evidence bearing on a number of relevant Senate factors, including, *inter alia*, (1) a history of official discrimination by the State of Florida touching on the right to vote, including but not limited to the racially discriminatory origins of blanket felon disenfranchisement in the state; (2) the use of voting practices or procedures that enhance opportunities for discrimination against the minority group; and (3) the effects of discrimination in other areas that affect felon disenfranchisement, such as education, employment, and health.[26] When taken in the light

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25. In this regard, we also find that Professor Richard Engstrom's expert testimony on racially polarized voting in Florida should not have been excluded on the grounds that it is not relevant to this type of vote denial claim. Although the weight to be given it is left to the fact-finder, the evidence is relevant to the consideration of the totality of the circumstances, including the extent of racial bias in the community, and the interaction of those circumstances. Moreover, as this case is being remanded for further consideration and discovery, the arguments pertaining to a delayed disclosure of the testimony of James Ginger and the five Florida Supreme Court Racial and Ethnic Bias Study Commission reports on which he relied are moot, as the State now has the opportunity to respond.

26. For example, the record includes evidence of Florida's history of official discrimination in elections; the disproportionate impact of felon disenfranchisement on African Americans; racial bias in the criminal justice system, *see* Doc. 142 at 17-18 (describing the conclusion of the Florida Supreme Court's Racial and Ethnic

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most favorable to the Plaintiffs, a fact-finder could conclude that under the totality of the circumstances test, this evidence demonstrates intentional racial discrimination behind Florida's felon disenfranchisement as well as a nexus between disenfranchisement and racial bias in other areas, such as the criminal justice system, in violation of the Voting Rights Act.

For the foregoing reasons, summary judgment should not have been granted on the Plaintiffs' Section 2 vote denial claim.[27]

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Bias Study Commission that "differential treatment results, at least in part, from racial and ethnic bias on the part of enough individual police officers, prosecutors, and judges to make the system operate as if it intended to discriminate against non-whites"); the historical use of criminal justice in Florida as a tool to subjugate African Americans; and the impact of past racially discriminatory criminal justice policies on current disenfranchisement. The Plaintiffs also cite to evidence of the effects of discrimination in education, such as differences in graduation rates, higher education degrees, and per capita income; the impact of those effects on criminal arrest rates and on the restoration of rights after serving a sentence; and the tendency of the eligibility requirements for the restoration of rights to exclude more African Americans.

27. The dissent argues that our interpretation of the scope of the Voting Rights Act creates serious constitutional problems because it allows the Voting Rights Act to "trump" the text of Section 2 of the Fourteenth Amendment, which expressly permits states to deny the right to vote "for participation in rebellion, or other crime." However, notwithstanding the text of Section 2, states clearly do not have the right to intentionally disenfranchise felons on the basis

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of race. *See Hunter*, 471 U.S. at 233 ("We are confident that § 2 [of the Fourteenth Amendment] was not designed to permit the purposeful racial discrimination attending the enactment and operation of [Alabama's criminal disenfranchisement law] which otherwise violates § 1 of the Fourteenth Amendment. Nothing in our opinion in *Richardson v. Ramirez*, *supra*, suggests the contrary."). Thus, although Congress might not be able to ban all state criminal disenfranchisement laws, it may certainly exercise the power granted to it under Section 5 of the Fourteenth Amendment to enforce statutorily the constitutional prohibition against racially discriminatory criminal disenfranchisement. *See Baker*, 85 F.3d at 936- 37 (Feinberg, J., concurring) (writing for one-half of the evenly-split *en banc* Second Circuit); *cf. Marengo County Comm'n*, 731 F.2d at 1550, 1563 (holding that Section 2 as amended in 1982 is a constitutional exercise of congressional enforcement power under the 14th and 15th Amendments).

Moreover, insofar as the dissent is assuming that Section 2 of the Fourteenth Amendment expressly authorizes Florida to disenfranchise convicted felons, even where its manner of doing so disproportionately impacts racial minorities, we question this interpretation, for which the dissent provides no authority. We think it better to interpret this constitutional provision to permit Florida and other states to disenfranchise convicted felons in a racially neutral manner—that is, in a manner that is neither racially motivated nor produces racially disproportionate effects. Viewed in this light, the Constitution's express permission to states to disenfranchise felons is compatible with the scope of the Voting Rights Act, and no constitutional problem arises by assuming that Congress may use its enforcement power to proscribe felon disenfranchisement policies that have racially discriminatory effects. *Cf. Marengo County Comm'n*, 731 F.2d at 1563 ("Section 2 [of the Voting Rights Act]

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IV. POLL TAX/WEALTH DISCRIMINATION CLAIMS

Access to the franchise cannot be made to depend on an individual's financial resources. *Harper v. Va. State Bd. of*

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does not conflict with or contract any right protected by the Constitution, and nothing in the Constitution either explicitly or implicitly prohibits a results standard for voting rights violations.").

Finally, we note that the legislative history and precedent discussed by the dissent pertain only to Section 4 of the Voting Rights Act, 42 U.S.C. § 1973b, which addresses "tests or devices" used to determine voter eligibility in certain states and political subdivisions, and not to Section 2. Our predecessor court observed that the Voting Rights Act of 1965 "contains a number of different provisions each with a different objective, that for its comprehension critical examination of each section is essential and that the reader cannot, therefore, assume that each of the sections is designed to reach the same objective or is necessarily to be read in the same manner." *United States v. Uvalde Consol. Indep. Sch. Dist.*, 625 F.2d 547, 550 (5th Cir. 1980). *See also Baker*, 85 F.3d at 939 (Feinberg, J., concurring) ("Because §§ 2 and 4 have different purposes, scope and language, the legislative history of § 4(c) is not necessarily applicable to interpretation of § 2."). Section 4's prohibition of specified "tests or devices" brings with it a host of additional requirements for states and political subdivisions covered by the section. In contrast, Section 2 applies nationally to prohibit a broader range of practices than those "tests or devices" defined in Section 4, but only when their use results in the denial or abridgement of the right to vote on account of race. It is perfectly conceivable that Congress might wish to exclude a particular practice from section 4's "test or device" label to avoid attaching to it the additional requirements, yet still intend to prohibit that practice when the evidence shows that its use results in the denial of the right to vote on account of race.

Elections, 383 U.S. 663, 668, 16 L. Ed. 2d 169, 86 S. Ct. 1079 (1966). As the Second Circuit has stated, "the focal question is whether [the State], once having agreed to permit ex-felons to regain their vote and having established administrative machinery for this purpose, can then deny access to this relief, solely because one is too poor to pay the required fee." *Bynum v. Conn. Comm'n on Forfeited Rights*, 410 F.2d 173, 175-76 (2d Cir. 1969) (sending challenge to Connecticut's $5 fee for filing an application for restoration of rights to a three-judge district court).

In this case, however, Florida's Rules of Executive Clemency do not deny access to the franchise to those too poor to pay restitution.[28] Under the Rules, restoration of civil rights, including the franchise, can still be granted to felons who cannot afford to pay restitution. We are not convinced that requiring a hearing under certain circumstances, including the failure to pay restitution, is sufficient to support the Plaintiffs' claim. Thus, because the current Rules of Executive Clemency do not deny access to the restoration of the franchise based on ability to pay, we affirm the district court's judgment that no violation of the constitutional and statutory prohibitions against poll taxes exists here.[29]

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28. The district court erroneously observed that "It is not Plaintiffs' right to vote which payment of a victim restitution is being conditioned but rather it is the restoration of his civil rights which is being conditioned." *Johnson*, 214 F. Supp. 2d at 1343. As one of the civil rights to be restored, clearly the right to vote depends on any conditions that apply to the restoration of civil rights in general.

29. In doing so, we say nothing about whether conditioning an application for clemency on paying restitution would be an invalid poll tax.

V. CONCLUSION

We therefore AFFIRM the district court's order granting summary judgment to Defendants on the poll tax claim. We REVERSE and REMAND the equal protection and vote denial claims.

AFFIRMED IN PART AND REVERSED AND REMANDED IN PART.

KRAVITCH, Circuit Judge, dissenting:

I disagree with the majority's analysis of both the Equal Protection and Voting Rights Act claims. Therefore, respectfully I dissent.

I. The Equal Protection Claim

The text of the Fourteenth Amendment explicitly allows states to disenfranchise convicted felons, U.S. Const. amend. XIV, § 2, and the Supreme Court unambiguously has determined that a state's decision to permanently disenfranchise such citizens, in itself, is not an Equal Protection violation. *Richardson v. Ramirez*, 418 U.S. 24, 53-55, 94 S. Ct. 2655, 2670-71, 41 L. Ed. 2d 551 (1974). Of course, a state may not *intentionally* use a facially-neutral measure to discriminate on the basis of race. *Washington v. Davis*, 426 U.S. 229, 239-42, 96 S. Ct. 2040, 2047-48, 48 L. Ed. 2d 597 (1976). This prohibition includes enacting a felon disenfranchisement provision in order to deprive one racial group of its right to participate in the political process. *Hunter v. Underwood*, 471 U.S. 222, 233, 105 S. Ct. 1916, 1923, 85 L. Ed. 2d 222 (1985). But the State of Florida's decision to bar felons from voting should not, in itself, cast suspicion on the motives of the state. The dispositive question in this case is whether the plaintiffs have alleged such facts that, if true, would be sufficient to establish intentional discrimination in Florida's *current* disenfranchisement statute. In my view, the plaintiffs do not do so, and thus I would affirm the district court.

A. Background

The State of Florida's decision to disenfranchise felons has a long history, beginning before the Civil War. In its 1838 Constitution, Florida first denied voting rights to those convicted of crimes. After the Civil War, Florida was required to change its Constitution for readmittance to the Union and subsequently held two constitutional conventions—one in 1865 and the other in 1868. The 1865 Constitution was inadequate because it did not extend the franchise to African Americans. The 1868 Constitutional Convention cured this defect. Delegates to both conventions decided to disenfranchise felons, a decision explicitly left to their discretion by the Fourteenth Amendment. One hundred years later in 1968, the State of Florida comprehensively revised its Constitution and again decided to deny felons the right to vote. Any felon, however, who has completed his sentence, including any orders of restitution, may apply for clemency to have his civil rights restored.[1] Fla. Stat. § 940 (2003).

B. The Constitutional Revision Process

There is no question that the felon disenfranchisement provision was based on a non-racial rationale when it was first included in the Florida Constitution in 1838. At that time, the right to vote was only extended to white males. The plaintiffs allege that the decision to retain the disenfranchisement provision in the 1868 Constitution was motivated by a desire to minimize black voting power. Because it is not the role of this court to make factual

1. There are conditions to the restoration of civil rights, including conviction of fewer than three violent crimes.

determinations, we view the evidence in the light most favorable to the plaintiffs.[2] We need not assume, however, that racial animus was the *sole* rationale. Indeed, as the plaintiffs' expert acknowledges, at least five African American delegates to the 1868 Convention, of the sixteen African American delegates voting, supported this provision, presumably not for racially-discriminatory reasons.

In 1968, Florida again reexamined and revised its Constitution and enacted the current felon disenfranchisement provision. The 1968 Constitution was passed after the state had engaged in four stages of

2. Nonetheless, I question the majority's description of the record. In particular, the majority states that one white delegate to the 1868 Constitutional Convention stated several years later that he had helped prevent the state from being "niggarized." A white politician running for office in 1872 made this despicable comment in reference to the entire 1868 Constitution. Although this is evidence of an unfortunate and indefensible racial animus in nineteenth-century Florida politics, there is no evidence that the comment was in reference to the felon disenfranchisement provision. It is far more likely that the comment referenced other provisions in the 1868 Constitution, such as the voter apportionment system.

The plaintiffs' expert states voter apportionment and the appointment (rather than election) of many political posts were the most significant and well-known issues of 1868 Constitutional Convention, while felon disenfranchisement was a relatively minor issue. In fact, the plaintiffs' expert acknowledged that the historical record is mixed on the felon disenfranchisement provision. The 1868 Constitution's felon suffrage provisions garnered the support of several of the Radical Republicans, including four African American delegates who consistently voted with the Radical Republicans. Doc. 122 at 875.

deliberation, including debate and revision by the Suffrage and Elections Committee, review by the Florida Constitutional Revision Committee, approval from both houses of the legislature and finally affirmation by a statewide referendum.

There is no allegation in the complaint that the 1968 Constitutional Convention was infected with any racial animus, and the plaintiffs did not present any evidence that racial animus was present in this process.[3] As the majority opinion states, the "summary judgment record reflects no evidence that racial considerations were discussed by the participants in the 1968 constitutional revision process when they passed the felon disenfranchisement provision."

Florida's revision of its constitution in 1968 distinguishes it from some other states with a history of racial discrimination. For instance, the State of Alabama enacted a felon disenfranchisement provision in 1901 with the specific intent of disenfranchising African American voters, and unlike Florida, Alabama never revisited the provision through the legislative process. *Hunter*, 471 U.S. at 233, 105 S. Ct. at 1922.

C. Equal Protection Analysis

A facially-neutral provision violates the Equal Protection Clause if adopted with the intent to discriminate against a racial group. *Washington v. Davis*, 426 U.S. at 239, 96 S. Ct.

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3. The plaintiffs stipulate that there is no evidence that legislators were concerned with or considered the consequences of the policy along racial lines.

at 2047. Here, there is no allegation in the complaint that the 1968 Constitution was adopted with the intent to discriminate based on race.

1. **Applying *Hunter v. Underwood***

In *Hunter v. Underwood*, the Supreme Court examined head-on the issue of felon disenfranchisement. 471 U.S. at 223, 105 S. Ct. at 1917. The Court determined that the Alabama Constitution violated the Equal Protection Clause because it was adopted in 1901 as a means of minimizing the political power of its African American population. *Id.* at 228-230, 105 S. Ct. at 1920-21. There, Alabama's elected representatives neither altered the provision nor reenacted it in a political atmosphere free of racial bias. Rather, all of the amendments to the constitution were the result of judicial action. *Id.* at 233, 105 S. Ct. at 1922.

In *Hunter*, the Supreme Court, affirming the decision of this court, established an easily applied test for finding Equal Protection Clause violations in the context of felon disenfranchisement. *Id.* at 227-28, 105 S. Ct. at 1920 (1985). That test is as follows:

> Presented with a neutral state law that produces disproportionate effects along racial lines, the Court of Appeals was correct in applying the approach of *Arlington Heights* to determine whether the law violates the Equal Protection Clause of the Fourteenth Amendment: "Official action will not be held unconstitutional solely because it results in a racially disproportionate

> impact . . . Proof of racially discriminatory intent or purpose is required to show a violation of the Equal Protection Clause." Once racial discrimination is shown to have been a "substantial" or "motivating" factor behind enactment of the law, the burden shifts to the law's defenders to demonstrate that the law would have been enacted without this factor.

Id. (citation omitted).

Under this analysis, we apply a two-step test to determine whether a particular felon disenfranchisement provision violates the Equal Protection Clause. First, we examine whether there is any proof that racial discrimination was a substantial or motivating factor in the state's decision to deny the right to vote to felons. Second, we determine whether the state can show that the provision would have been enacted without the racially discriminatory motive.

For the purposes of appeal, we assume, without deciding, that the plaintiffs have demonstrated that there was some racial animus in the 1868 Constitutional process. This, however, does not lead to the conclusion that race was a motivating factor in the political process which resulted in the 1968 Constitution, a hundred years later.

We next examine whether Florida would have chosen to disenfranchise felons if legislators did not have a discriminatory motive. In *Hunter*, this was a more complicated analysis because it required a counter-factual scenario: Given that Alabama only legislatively addressed

this issue once, what would legislators have done if they did not have a discriminatory motive? 471 U.S. at 228-29, 105 S. Ct. at 1920. Here, we have the luxury of not having to delve into complex counter-factual scenarios because Florida simplified the analysis by returning to the issue in 1968. Florida's 1968 Constitution permits us to determine whether the state would have chosen to disenfranchise felons if the impermissible motive was absent. The results are plain: There is no allegation of racial discrimination in 1968 and legislators decided to include a felon disenfranchisement provision in the revised constitution after consideration by two committees. This decision was then affirmed by both houses of the legislature and by popular referendum.

Thus, Florida's provision is not a violation of the Equal Protection Clause under the standard adopted by the Supreme Court in *Hunter*. Florida's reenactment of the felon disenfranchisement provision in the 1968 Constitution conclusively demonstrates that the state would enact this provision even without an impermissible motive. Reenactment is *exactly* the measure that we would require Florida to take if we did find an Equal Protection Clause violation, and thus the state has already cured the provision on its own initiative. The state, therefore, has met its burden as a matter of law by undertaking the precise measure the plaintiffs are seeking.[4]

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4. The majority states that Florida must prove that it would have enacted this provision in 1868 without a discriminatory motive to withstand summary judgment. This would be the case if the 1868 provision was being challenged. In the current litigation, however, the plaintiffs are challenging the 1968 provision and they have presented no evidence that this provision, passed one hundred years later, was motivated by discriminatory intent.

Moreover, Florida's provision is arguably not even subject to this type of intent analysis because the felon disenfranchisement provision did not create a disparate impact along racial lines in 1968. Accepting the plaintiffs' best estimates for 1968 as true, the felon disenfranchisement provision denied voting rights to far more whites than African Americans and decreased the percentage of African-American voters state-wide by less than one quarter of one percent.[5] Although proportionately more African American were affected, the percentage of eligible African Americans voters in the voting age public in 1968 dropped only from 12.53% to 12.32% due to felony convictions. The majority focuses on the *present* racially disparate impact of the felon disenfranchisement provision, but this disparate impact was not present in 1968.

2. The Majority's Standard

The majority establishes a different standard than the one announced in *Hunter*. Instead of examining whether legislators would have enacted the felon disenfranchisement provision if they did not have an impermissible motive, the majority remands the case to the district court and requires that the state prove that it "knowingly and deliberatively reenacted it for a non-discriminatory reason." This standard is beyond what is required by *Hunter* because it invalidates facially-neutral provisions enacted by legislators who are not

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5. Doc. 163-Addendum. The plaintiffs' best estimates show that 44,562 white voters and 16,150 African American voters were disenfranchised in 1968 due to a felony conviction.

alleged to have discriminatory motives.[6] In effect, the majority requires that the State of Florida show that it considered the alleged racial discrimination in the 1868 Constitution and that it "knowingly and deliberately" decided to re-enact the provision for other reasons in 1968. The present law does not require this level of proof. Florida's current provision is constitutional because—as the majority agrees— there is no evidence of any racial bias in the re-enactment. *See also Cotton v. Fordice*, 157 F.3d 388 (5th Cir. 1998) (holding that a felon disenfranchisement provision did not violate the Equal Protection Clause because the current provision was adopted without discriminatory intent.).

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6. The majority cites *Hunter* for the proposition that "proof of discriminatory intent behind a specific policy in the past creates an inference that the impermissible purpose continues into the present despite the passage of time and *even, in some instances, intervening changes to the policy.*" (emphasis added). In *Hunter*, the Supreme Court found that revision to the state provision by *state courts*, which severed "some of the more blatantly discriminatory" portions of the law, did not purge the provision of its *legislative* intent. 471 U.S. at 232-33. However, the Supreme Court did not hold that intervening *legislative* changes to the policy were legally insufficient to remove an earlier discriminatory intent. Because the present case deals with legislative changes, rather than judicial changes, to the felon disenfranchisement policy, *Hunter* should not be read to support the proposition that an impermissible motive in Florida's 1868 Constitution continues to the present in spite of legislative changes made in the 1968 Constitution.

A. Justifying Heightened Review

The majority argues that Florida's 1968 facially-neutral provision, passed without any evidence of racial discrimination, should be deemed a violation of the Equal Protection Clause. To support its position, the majority relies on *United States v. Fordice*, 505 U.S. 717, 112 S. Ct. 2727, 120 L. Ed. 2d 575 (1992), which involved a challenge to Mississippi's system of higher education. *Fordice*, however, involved an extreme case of recent state discrimination. There, Mississippi actively resisted removing the segregated system of education in the 1960s, failed to fund even limited educational reform in 1969, and was sued by the United States and private plaintiffs in 1975 for failing to comply with the Equal Protection Clause. *Id.* at 722-25, 112 S. Ct. at 2732-34. The issue in *Fordice* was whether the state's facially-neutral education system, which was passed only after the state was required to integrate its schools by court order, was valid under the Equal Protection Clause if the system maintained the racially disparate impact that de jure segregation had created. The Supreme Court found that Mississippi's actions were not consistent with the Equal Protection Clause if Mississippi made no effort to remove the discriminatory effects of de jure segregation. The present case and *Fordice* are simply not analogous.

First, Florida's 1968 provision did not continue the adverse disparate impact of earlier *de jure* measures, which makes the present case entirely different than the situation in *Fordice*. At the time the Mississippi legislature adopted its education system, the system of higher education was almost completely racially segregated. *Id.* at 722, 112 S. Ct.

at 2732. In *Fordice*, therefore, the Supreme Court was concerned that Mississippi was attempting to perpetuate its racially segregated education system, established in a time of *de jure* segregation, through a facially-neutral provision. In contrast, when Florida adopted its felon-disenfranchisement provision in 1968, the racial effects of the provision were minor. In 1968, Florida legislators and voters were not attempting to extend the effects of de jure discrimination with a facially-neutral provision because there was no adverse impact to extend by passing the felon disenfranchisement provision.[7] Florida's provision simply did not maintain a pattern of discrimination the way Mississippi's provision did. Consequently, the heightened review used in *Fordice* is not appropriate here.

Second, the current Florida provision was passed one hundred years after allegedly intentional discrimination occurred, whereas Mississippi's provision was passed shortly after the end of *de jure* segregation in education. Needless to say, the Florida legislators who passed the 1868 Constitution and the 1968 Constitution were not the same people. In *Fordice*, however, the legislators, who refused to desegregate the Mississippi schools without a court order in the 1960s,

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7. The majority repeatedly refers to the current effects of the felon disenfranchisement provision—some forty years after it was passed-but this is simply not relevant for understanding the motives of legislators in 1968. Unlike in *Fordice*, the racially disparate effect of Florida's voting provision was not present when the provision was passed. In contrast to school desegregation where the racially disparate impact was at its height in the 1950s and 1960s and has decreased since, the felon disenfranchisement rule had very little racially disparate impact in the 1960s and only developed such an effect many years later.

most likely overlapped significantly with the legislators who passed the facially-neutral education system in the 1970s. Given the proximity in time between Mississippi's intentional discrimination and the facially-neutral provision in education, we should have a healthy skepticism that the facially-neutral provision was indeed neutral. Certainly, the Mississippi legislators who voted for the facially-neutral provision understood the history of racial segregation in education and the likely racial effects of their new education system. But this healthy skepticism should not be applied here, because it is not reasonable to assign any impermissible motives held by the 1868 Florida legislators to the 1968 legislators who voted for the present felon disenfranchisement provision.

Third, Florida has a valid public policy reason for disenfranchising felons, where Mississippi did not have a sound justification for its education policies. The majority quotes Justice Thomas's concurrence in *Fordice*, but Justice Thomas specifically states that this heightened review is only applicable when there is no sound public policy justification for the state law, stating: "A challenged policy does not survive under the standard we announce today if it began during the prior de jure era, produces adverse impacts, and persists without sound educational justification." *Fordice*, 505 U.S. at 746, 112 S. Ct. at 2745 (emphasis added). Where Mississippi schools did not have valid educational justification for maintaining segregated schools, Florida has a legitimate reason for denying the vote to felons.

Finally, we note that this circuit has been reluctant to extend the education line of cases to other areas. As this court stated in *Burton v. City of Belle Glade*, school desegregation

jurisprudence is unique and thus difficult to apply in other contexts. 178 F.3d 1175, 1190 (1999) (stating "In the first place, Appellants can point to no court that has ever applied Fordice outside of the education setting. Indeed, given the unique nature of school desegregation, we hesitate to extend Fordice to a property annexation case.") Moreover, as argued earlier, there is specific precedent from this court and the Supreme Court dealing with felon disenfranchisement. *See Richardson v. Ramirez*, 418 U.S. 24, 94 S. Ct. 2655, 41 L. Ed. 2d 551 (1974), *Hunter v. Underwood*, 471 U.S. 222, 105 S. Ct. 1916, 85 L. Ed. 2d 222 (1985), *Beacham v. Braterman*, 300 F. Supp. 182, 183 (1969), *aff'd* 396 U.S. 12, 90 S. Ct. 153, 24 L. Ed. 2d 11 (1969) (finding by a three judge panel that Florida's decision to disenfranchise felons was not a violation of the plaintiff's equal protection or due process rights). Because these cases establish clear standards by which to judge state action, we are bound by precedent and need not go into other areas of possibly analogous law.

B. Sufficient Deliberation

The majority argues that Florida has not yet demonstrated that it has "broken the causal chain" between the 1868 Constitution and the current provision. It maintains that the 1968 constitutional revisions to this provision were not sufficient because legislators did not adequately deliberate over this issue. But the record belies this conclusion: The provision was subject to significant deliberation.

The 1968 Constitution's felon disenfranchisement rule was first actively considered by the Suffrage and Elections Committee. The record reflects that the committee discussed

the provision, debated proposed changes, and ultimately decided to adopt the present provision, which is different from the 1868 provision. The committee also considered an alternative motion that would have eliminated the disenfranchisement rule to felons released from incarceration.[8] After discussion, the alternative motion failed. The new constitution was then accepted by the full committee, approved by both legislative houses, and affirmed by a state-wide referendum-all without any allegation of racial bias. Although reasonable people may disagree over the wisdom of the policy choice, the provision certainly received sufficient deliberation.

3. Wisdom of the Policy

Several of the amici argue that, as a policy matter, felons should be enfranchised, particularly those who have served their sentences and presumably paid their debt to society. But this is a policy decision that the United States Constitution expressly gives to the state governments, not the federal courts. U.S. Const. amend. XIV, § 2. Florida already has legislatively reexamined this provision since 1868 and affirmed its decision to deny felons the vote. Federal courts cannot question the wisdom of this choice.

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8. The minutes of the committee meeting record the following motion was considered:

> "Mr. Goodrich offered the following substitute motion to Mr. Pettigrew's motion: Delete Section 4 and insert: 'The Legislature may by law exclude persons from voting because of mental incompetence or commitment to a jail or penal institution.' After discussion, Mr. Goodrich's motion failed for lack of a second."

Doc. App. 10 at 983.

For the above reasons I would affirm the district court's grant of summary judgment on this count.

II. The Voting Rights Act Claim

I also respectfully dissent from the majority's remand of the Voting Rights Act claim. In my view, the Voting Rights Act does not apply to felon disenfranchisement provisions. The majority's interpretation of the scope of the Voting Rights Act creates grave questions as to the constitutionality of the Voting Rights Act and is contrary to Congress's statements regarding its coverage.

A. The Scope of the Voting Rights Act

Florida's discretion to deny the vote to convicted felons is fixed by the text of § 2 of Fourteenth Amendment, which states:

> When the right to vote . . . is denied to any of the male inhabitants . . . or in any way abridged, *except for participation in rebellion, or other crime*, the basis of representation therein shall be reduced in the proportion which the number of such male citizens shall bear to the whole number of male citizens twenty-one years of age in such State.

U.S. Const. amend. XIV, § 2 (emphasis added).[9] Interpreting the Voting Rights Act to deny a state this discretion, as the

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9. The full text of Section 2 states:

> Representatives shall be apportioned among the several States according to their respective numbers, counting

(Cont'd)

majority does, creates a constitutional problem because such an interpretation allows a congressional statute to trump the text of the Constitution.

It is a long-standing rule of statutory interpretation that federal courts should not construe a statute to create a constitutional question unless there is a clear statement from Congress endorsing this understanding. As the Supreme Court stated in *DeBartolo Corp. v. Florida Gulf Coast Trades Council*:

> Where an otherwise acceptable construction of a statute would raise serious constitutional problems, the Court will construe the statute to avoid such problems unless such construction is plainly contrary to the intent of Congress. This cardinal principle has its roots in Chief Justice Marshall's opinion for the Court in *Murray v. The Charming Betsy*, 6 U.S. (2 Cranch) 64, 118, 2

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> the whole number of persons in each State, excluding Indians not taxed. But when the right to vote at any election for the choice of electors for President and Vice President of the United States, Representatives in Congress, the Executive and Judicial officers of a State, or the members of the Legislature thereof, is denied to any of the male inhabitants of such State, being twenty-one years of age, and citizens of the United States, or in any way abridged, except for participation in rebellion, or other crime, the basis of representation therein shall be reduced in the proportion which the number of such male citizens shall bear to the whole number of male citizens twenty-one years of age in such State.

> L. Ed. 208 (1804), and has for so long been applied by this Court that it is beyond debate. . . . This approach not only reflects the prudential concern that constitutional issues not be needlessly confronted, but also recognizes that Congress, like this Court, is bound by and swears an oath to uphold the Constitution. The courts will therefore not lightly assume that Congress intended to infringe constitutionally protected liberties or usurp power constitutionally forbidden it.

485 U.S. 568, 575, 108 S. Ct. 1392, 1397-98, 99 L. Ed. 2d 645 (1988). Thus when we analyze the scope of the Voting Rights Act, we should first address whether one interpretation presents grave constitutional questions where other interpretations would not, and then examine whether the latter interpretation is clearly contrary to Congressional intent. *Id.*

Here, the majority's interpretation creates a serious constitutional question by interpreting the Voting Rights Act to trump the text of the Fourteenth Amendment.[10] Congress undoubtedly has the constitutional authority to prohibit many measures that are not explicitly prohibited in the Fourteenth Amendment, but this enforcement power arguably does not extend to prohibiting constitutionally protected practices. This is not to say that a state's felon disenfranchisement provisions can never be challenged. As pointed out above and as the decision in *Hunter* confirmed, states cannot use felon

10. If this court chooses to adopt an interpretation that confronts the constitutional question, then we must address directly whether Congress has the power to trump constitutional provisions that are not applied in violation of the Equal Protection Clause.

disenfranchisement provisions to discriminate intentionally on the basis of race. 471 U.S. at 233, 105 S. Ct. at 1923. Thus, the plaintiffs have a remedy if the state's provision violates the Equal Protection Clause. *Id.* It is a different matter, however, when a statute limits a state's delegated power in contravention of the Fourteenth Amendment's text.

The majority opinion cites *Hunter* for the proposition that the felon disenfranchisement provision can be challenged under the Voting Rights Act. But in *Hunter*, the Supreme Court dealt exclusively with the Equal Protection Clause and did not discuss the Voting Rights Act. The Supreme Court has never given any indication that the felon disenfranchisement provision can be challenged under the Voting Rights Act. To the contrary, in *Richardson v. Ramirez*, the Supreme Court explained that felon disenfranchisement provisions are different from other state franchise rules because they are permitted by the Fourteenth Amendment's express language. 418 U.S. 24, 54, 94 S. Ct. 2655, 2671, 41 L. Ed. 2d 551 (1974).

For the majority's analysis of the Voting Rights Act to be correct, we must look for a clear statement from Congress that it intended such a constitutionally-questionable result. *DeBartolo*, 485 U.S. at 575, 108 S. Ct. at 1397. Instead of a clear statement from Congress that the majority's interpretation was intended, the legislative history indicates just the opposite-that Congress did not intend the Voting Rights Act to apply to felon disenfranchisement provisions.[11]

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11. The Second Circuit reinstated a district court opinion that reached the same conclusion on the scope of the Voting Rights Act. In *Baker v. Pataki*, an en banc panel was evenly split on the issue. (Cont'd)

1. Congressional Statements in 1965

The scope of the Voting Rights Act is limited. Congress first passed the act in 1965 to prevent states from discriminating against minorities in voting.[12] The act was

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85 F.3d 919 (2d Cir. 1996). In an opinion urging the court to affirm, Judge Mahoney, joined by four other judges, argued that the Voting Rights Act was of questionable constitutionality if it applied to felon disenfranchisement provisions. *Id.* at 929-32. The judges looked for a clear statement from Congress supporting this interpretation and found evidence of Congressional support to be "manifestly lacking." *Id.* at 930.

Only the Ninth Circuit has found a felon disenfranchisement provision to be a statutory violation. *Farrakhan v. Washington*, 338 F.3d 1009 (9th Cir. 2003). There, the plaintiffs brought a Voting Rights Act challenge to the State of Washington's felon disenfranchisement provision, claiming that racism in the criminal justice system interacted with the state's suffrage laws to deny equal voting opportunities to minorities. *Id.* at 1020. The Ninth Circuit reversed the grant of summary judgment, but did not specifically address the constitutionality of its interpretation. Logically, that court must have found that the statute covered the challenged provision and that Congress had the constitutional authority to regulate felon disenfranchisement provisions to reach its holding. Nevertheless, the Ninth Circuit did not provide any reasoning for its finding, and thus that court's decision, which is only persuasive authority in our circuit, should not inform our analysis.

12. Section 1973 of the Voting Rights Act in 1965 stated:

> No voting qualification or prerequisite to voting, or standard, practice, or procedure shall be imposed or applied by any State or political subdivision to deny or abridge the right of any citizen of the United States to vote on account of race or color.

intended to cover voting tests and other practices, such as districts designed by states to minimize minority voting. *See Burton v. City of Belle Glade*, 178 F.3d 1175, 1196 (11th Cir. 1999). The Senate and House reports make clear, however, that Congress did not intend the Voting Rights Act to cover felon disenfranchisement provisions. The reports indicate that tests for literacy or good moral character should be scrutinized, but felon disenfranchisement provisions should not. S. Rep. 89-162, 1965 U.S.C.C.A.N. 2508, 2562. The only place where legislators addressed felon disenfranchisement provisions was with regard to Section 4, where the Senate Report reflects that legislators intended to exempt the voting restrictions on felons from the statute's coverage, stating:

> The third type of test or device covered is any requirement of good moral character. This definition would not result in the proscription of the frequent requirement of States and political subdivisions that an applicant for voting or registration for voting be free of conviction of a felony or mental disability.

Id.

Likewise the House Report also states that the Voting Rights Act was not designed to prohibit felon disenfranchisement:

> This subsection does not proscribe a requirement of a State or any political subdivision of a State that an applicant for voting or registration for

> voting be free of conviction of a felony or mental disability.

1965 U.S.C.C.A.N. 2437, 2457. These reports indicate that neither house of Congress intended to include felon disenfranchisement provisions within the statute's scope. These are the only references to felon disenfranchisement made in reports to the 1965 act.

Furthermore, this court's predecessor previously decided that the 1965 act did not cover a state's decision to exclude felons from voting. In *United States v. Ward*, the former Fifth Circuit held that the Voting Rights Act prohibited Louisiana from imposing any literacy test or other qualification on voter registration, but found that the act did not extend to felon disenfranchisement rules. 352 F.2d 329, 332 (5th Cir. 1965).[13] There, the court issued an order enjoining the state from applying the voting tests, but explicitly exempted felony convictions from the order. The court ordered that the state cease

> . . . requiring any applicant for voter registration in Madison Parish, as a precondition to such registration, to take or pass any test of literacy, knowledge, or understanding or to comply with any other test or device as defined in Section 4(c) of the Voting Rights Act of 1965, Public Law 89- 110, 79 Stat. 438-439, i.e., any requirement (including the "good character" requirement specified in Article

13. In *Bonner v. City of Prichard*, 661 F.2d 1206, 1209 (11th Cir. 1981) (*en banc*), this court adopted as binding precedent all decisions of the former Fifth Circuit handed down prior to October 1, 1981.

> VIII, Section 1(c) of the Louisiana Constitution and Title 18, Section 32, of the Louisiana Code, *except to the extent that these provisions permit disqualification for conviction of a felony*).

Id. at 332 (emphasis added).

2. Congressional Statements in 1982

Congress most recently amended the Voting Rights Act in 1982 in response to the Supreme Court's decision in *City of Mobile v. Bolden*, 446 U.S. 55, 100 S. Ct. 1490, 64 L. Ed. 2d 47 (1980), in an attempt to clarify the standard for finding statutory violations. In revising the statute, Congress intended to depart from the intent-based standard of the Supreme Court's Equal Protection jurisprudence and establish an effects-based standard. S. Rep. 97-417, 15-17, 1982 U.S.C.C.A.N. 177, 192-94 (1982). After the 1982 amendment, a state practice could survive Equal Protection Clause scrutiny but fail Voting Rights Act scrutiny.

Although the 1982 amendments were significant in terms of the legal test applied to practices covered by the act, they are not relevant here because the challenged provision remains outside the scope of the Voting Rights Act. Neither the plain text nor the legislative history plainly declares Congress's intent to extend the Voting Rights Act to felon disenfranchisement provisions.[14] The Senate Report, which goes into great detail

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14. The current text, as amended in 1982, states:

> (a) No voting qualification or prerequisite to voting or standard, practice, or procedure shall be imposed or applied by any State or political subdivision in a manner

(Cont'd)

on legislative intent, made no mention of felon disenfranchisement provisions.[15] Although it is conceivable

(Cont'd)

> which results in a denial or abridgement of the right of any citizen of the United States to vote on account of race or color, or in contravention of the guarantees set forth in section 1973b(f)(2) of this title, as provided in subsection (b) of this section.
>
> (b) A violation of subsection (a) of this section is established if, based on the totality of circumstances, it is shown that the political processes leading to nomination or election in the State or political subdivision are not equally open to participation by members of a class of citizens protected by subsection (a) of this section in that its members have less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice. The extent to which members of a protected class have been elected to office in the State or political subdivision is one circumstance which may be considered: Provided, that nothing in this section establishes a right to have members of a protected class elected in numbers equal to their proportion in the population.

Section 1973b(f)(2) states that:

> No voting qualification or prerequisite to voting, or standard, practice, or procedure shall be imposed or applied by any State or political subdivision to deny or abridge the right of any citizen of the United States to vote because he is a member of a language minority group.

15. In addition, there are currently two bills circulating in Congress that aim to limit a state's discretion to disenfranchise felons

(Cont'd)

that certain legislators may have wanted the Voting Rights Act to encompass felon disenfranchisement provisions, we should not assume that Congress intended to produce a statute contrary to the plain text of the Fourteenth Amendment without a clear statement. *DeBartolo*, 485 U.S. at 575, 108 S. Ct. at 1397.

In short, I believe the majority adopts a constitutionally questionable interpretation of the Voting Rights Act—one in which the statute prohibits a practice that the Fourteenth Amendment explicitly permits. As a matter of statutory construction, we should avoid such an interpretation. Moreover the case for rejecting the majority's interpretation is particularly strong here, where Congress has expressed its intent to exclude felon disenfranchisement measures from Voting Rights Act scrutiny.[16]

(Cont'd)

and include findings that felon disenfranchisement provisions create a disparate racial impact. Civil Participation and Rehabilitation Act, H.R. 259, 108th Cong. § 2(g) (2003), Ex-Offenders Voting Rights Act of 2003, H.R. 1433, 108th Cong. § 2(a)(11) (2003). Although not dispositive in interpreting the scope of the Voting Rights Act, it is unclear why these bills have been proposed if Congress has the clear understanding that the Voting Rights Act currently covers these cases.

16. Even if we assume that the Voting Rights Act applies to Florida's provision, the plaintiffs still must demonstrate that specific racial biases in society cause minorities to be convicted of felonies at a higher rate than whites. *Cf. Thornburg v. Gingles*, 478 U.S. 30, 47, 106 S. Ct. 2752, 2764, 92 L. Ed. 2d 25 (1987) (stating that the Voting Rights Act requires that electoral practices interact with social

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Accordingly, I dissent from the decision to remand and would affirm the district court on this count also.

(Cont'd)
or historical conditions *to cause* racial inequality in the political process). Without such an initial showing, the plaintiffs do not allege a sufficiently specific nexus between racial discrimination and the felon disenfranchisement rule.

The majority opinion discusses a long list of possible areas of discrimination, but here we are concerned only with how the state discriminates against similarly situated persons who have committed felonies. The record includes some evidence that there is a statistical difference in the rate of felony convictions along racial lines, even accounting for other factors. This finding is disturbing, but the statistical analysis cannot speak to causation. The plaintiffs' statistical findings only demonstrate correlations between different variables and do not purport to establish causal relationships between these variables. Causation analysis must come from sources external to the statistical analysis. Thus by definition, the plaintiffs cannot establish a *causal* nexus between variables by statistical results alone.

The majority emphasizes that Voting Rights Act requires a "totality of the circumstances" analysis to evaluate whether racial discrimination, outside of the voting context, causes racial discrimination in the political process. I agree that this is the correct standard. I respectfully disagree with the majority, however, over what evidence is necessary to demonstrate that the alleged disparate impact in voting is caused by discrimination outside of the political process.

OPINION OF THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF FLORIDA, MIAMI DIVISION, DECIDED JULY 18, 2002

UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF FLORIDA, MIAMI DIVISION

CASE NO. 00-3542-CIV-KING

Thomas JOHNSON, et al.

Plaintiffs,

v.

Jeb BUSH, et al.,

Defendants.

July 18, 2002, Decided
July 18, 2002, Filed

ORDER GRANTING DEFENDANTS' MOTION FOR SUMMARY JUDGMENT

JAMES LAWRENCE KING, District Judge.

THIS CAUSE is before the Court on Defendants' Motion for Summary Judgment filed January 4, 2002. Plaintiffs filed a Corrected Response and Cross-Motion for Summary Judgment on January 25, 2002. Defendants filed a Corrected Reply on January 29, 2002. Plaintiffs filed a Reply on February 1, 2002. The Court heard argument on the cross-motions on May 24, 2002.

I. BACKGROUND

A. Lead Plaintiffs and Plaintiff Class

Plaintiff Thomas Jefferson is a 51-year-old African American male living in Gainesville, Florida with his wife and five children. He is the executive director of a non-profit Christian organization that runs a residential program for recently released offenders. Prior to moving to Gainesville in 1996, this Plaintiff lived in New York City where, after his release from a New York felony conviction in 1992, he worked for a homeless mission and a New York City transit agency. He has not had his civil rights restored and, thus, is ineligible to register and vote under Florida law. Mr. Johnson's life background is similar to the other seven lead Plaintiffs, five of whom are African American, one is a Hispanic and one is Caucasian. All have been convicted of felonies; all have successfully completed their terms of incarceration or probation; and all have not had restoration of their civil rights to register and vote.

Plaintiffs, on behalf of all Florida citizens convicted of felonies who have completed their sentences but nonetheless remain ineligible to vote, challenge Florida's disenfranchisement law. They allege that the disenfranchisement law arbitrarily and irrationally denies them the right to vote because of race, discriminates against them on account of race, and imposes an improper poll tax and wealth qualification on voting in violation of the First, Fourteenth, Fifteenth, and Twenty-Fourth Amendments to the United States Constitution and §§ 2 and 10 of the Voting Rights Act of 1965, codified at 42 U.S.C. § 1973 *et seq.*, and 42 U.S.C. § 1983.

B. Florida's Disenfranchisement Law

Florida's disenfranchisement of criminals can be traced back to its first constitution. The 1838 Constitution provided that: "The General Assembly shall have the power to exclude from . . . suffrage, all persons convicted of bribery, perjury, or other infamous crime. . . Laws shall be made by the General Assembly to exclude from . . . suffrage, those . . . convicted of bribery, perjury, forgery, or other high crime, or misdemeanor. . . ." Fla. Const. art. VI, §§ 4, 13 (1838). This disenfranchisement provision remained unchanged by Florida's 1861 Constitution, Fla. Const. art. VI, §§ 2, 9 (1861), and essentially unchanged by Florida's 1865 Constitution,[1] Fla. Const. art. VI, §§ 2, 9 (1865).

Florida's constitutional convention of 1868 made many changes to the suffrage and eligibility provisions from previous constitutions, including recognizing right of suffrage for African Americans. The disenfranchisement provision was amended to state: "nor shall any person convicted of a felony be qualified to vote at any election unless restored to civil rights. . . . The Legislature shall have power and shall enact the necessary laws to exclude from . . . suffrage, all persons convicted of bribery, perjury, larceny, or of infamous crime. . . ." Fla. Const. art. XIV, §§ 2, 4 (1868). The disenfranchisement provision remained essentially unchanged by the 1885 Constitution, except for reference to persons convicted "by a court of record." Fla. 9 (1861), Fla. Const. art. VI, §§ 4-5 (1885).

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1. Florida's Constitution of 1865 removed the comma after the words "high crime."

The current version of Florida disenfranchise law was adopted by the Florida legislature in 1968. Florida's 1968 Constitution includes a felon disenfranchisement provision that states: "No person convicted of a felony, or adjudicated in this or any other state to be mentally incompetent, shall be qualified to vote or hold office until restoration of civil rights or removal of disability." Fla. Const. art. VI, § 4.

C. Restoration of Rights and Removal of Disability

Individuals disenfranchised by the felon disenfranchised provision of the 1968 Constitution may seek restoration of their civil rights, including the right of vote, by application to the state Clemency Board. The Clemency Board consists of the Governor and the members of the Cabinet. Fla. R. Exec. Clem. 1. Under Florida's Rule of Executive Clemency, an individual convicted of a felony may have his or her civil rights, excluding the right to own, possess, or use firearms, automatically restored without a hearing after completing and satisfying all sentences and all conditions of supervision if certain additional requirements have been met. These additional requirements include: no conviction for a capital or life felony; no restoration of the individual's civil rights nor granting of the individual a pardon within the past 10 years by the Clemency Board; and no declaration that the individual is (1) a habitual felony offender, (2) a habitual violent offender, (3) a three-time violent offender, (4) a violent career criminal or (5) a prison release re-offender.

At the time Plaintiffs filed their Complaint, applicants for restoration of civil rights were additionally prohibited from "having any outstanding detainers, or any pecuniary

penalties or liabilities, which total more than $1,000 and result from any criminal conviction or traffic infraction." Pre-6/01 Fla. R. Exec. Clem. 5(II). Though that condition has been removed and the Clemency Board no longer requires applicants to have paid fines totaling over $1,000, the Clemency Board does continue to require applicants to pay all victim restitution prior to being eligible for restoration of civil rights. *See* Fla. R. Exec. Clem. 9(A)(2). Thus, disenfranchised felons are ineligible to receive restoration of their civil rights without having paid off any pecuniary liabilities or having paid the full amount of restitution to victims even though the sentence of imprisonment and supervision has been completed by rule of the Clemency Board.

The Clemency Board has the authority to investigate, review, and hold hearings with respect to all clemency applications, and has the final authority on whether to grant an application for restoration of civil rights. If an individual wishes to apply for clemency even though he or she does not satisfy the eligibility requirements, including payment of victim restitution, he or she may apply for a waiver of these requirements.

II. STANDARD OF REVIEW

Summary judgment is appropriate where "there is no genuine issue as to any material fact and . . . the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(c); *see Celotex Corp. v. Catrett,* 477 U.S. 317, 322, 91 L. Ed. 2d 265, 106 S. Ct. 2548 (1986) (citations omitted). The Court must view the evidence in the light most favorable

to the nonmoving party. *See Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 255, 91 L. Ed. 2d 202, 106 S. Ct. 2505 (1986).

The moving party bears the initial burden of demonstrating the absence of a genuine issue of material fact. If the movant meets this burden, the burden then shifts to the nonmoving party to establish that a genuine dispute of material fact exits. *See Hairston v. Gainesville Sun Publ'g Co.*, 9 F.3d 913, 918 (11th Cir.1993). If the evidence relied on is such that a reasonable jury could return a verdict in favor of the nonmoving party, then the Court should refuse to grant summary judgment. *See id.* at 919. A mere scintilla of evidence in support of the nonmoving party's position, however, is insufficient to defeat a motion for summary judgment. *See Anderson*, 477 U.S. at 252, 106 S.Ct. 2505. If the evidence is merely colorable or is not significantly probative, summary judgment is proper. *See id.* at 249-50.

III. DISCUSSION

A. Plaintiffs' Equal Protection and Due Process Claim of the Fourteenth Amendment

Plaintiffs' most basic assertion is that Florida's disenfranchisement law violates the substantive due process and equal protection under the 14th Amendment. They contend that permanent disenfranchisement of felons has no justifiable purpose, but instead is arbitrary and irrational. However, Plaintiffs' arguments fails in the face of clear precedent established by this Court and the Supreme Court of the United States. *Richardson v. Ramirez*, 418 U.S. 24, 41 L. Ed. 2d 551, 94 S. Ct. 2655, 72 Ohio Op. 2d 232 (1974); *Beacham v. Braterman*, 300 F. Supp. 182 (S.D. Fla. 1969).

In *Beacham v. Braterman*, a three judge district court held that the felon disenfranchisement provision at issue does not violate the Equal Protection nor the Due Process Clause of the Constitution of the United States. 300 F. Supp. 182. The *Beacham* court considered a class action challenging Florida's constitutional and statutory provisions disenfranchising convicted felons and the discretionary exercise of pardon power by the executive branch of the state government. It concluded that a state may constitutionally exclude from the franchise persons otherwise qualified to vote who have been convicted of a felony. *See id.* at 184 ("The propriety of excluding felons from a franchise has been so frequently recognized—indeed put forward by the Justices to illustrate what the states may properly do—that such expressions cannot be dismissed as unconsidered dicta."). The *Beacham* court specifically declared that it is not a denial of equal protection of law or due process of law for the state to restore discretionarily the right to vote to some felons and not to others.

The Supreme Court summarily affirmed that decision, 396 U.S. 12, 24 L. Ed. 2d 11, 90 S. Ct. 153 (1969). *Beacham*, therefore, is binding precedent upon this Court. *See, e.g., Hicks v. Miranda*, 422 U.S. 332, 344-45, 45 L. Ed. 2d 223, 95 S. Ct. 2281 (1975) ("Lower courts are bound by summary decisions by this Court. . . ."); 18 James Wm. Moore, et al., Moore's Federal Practice, § 1304[5] (3d ed. 1999) ("The Supreme Court treats its own summary affirmance of an appeal from a three judge district court as precedent to be followed."). Accordingly, Plaintiffs' Equal Protection and Due Process arguments are foreclosed by *Beacham*. In addition, the Supreme Court of the United States has also

weighed in on this issue. In *Richardson v. Ramirez*, the Court held that a State may, consistent with the Constitution of the United States, prohibit felons from voting under the Fourteenth Amendment. It explained that a blanket disenfranchisement provision does not violate the Equal Protection Clause of the Fourteenth Amendment because such a provision expressly finds "an affirmative sanction in § 2 of the Fourteenth Amendment." 418 U.S. at 53-4. The *Richardson* Court held that subsequent jurisprudence interpreting the Equal Protection Clause has not altered the "settled historical and judicial understanding" that felon disenfranchisement provisions do not violate the United States Constitution. *Id.* at 54. Thus, Plaintiffs' arguments fly in the face of clear Supreme Court precedent which held that felon disenfranchisement laws cannot be in violation of the Fourteenth Amendment to the Constitution, either under the Equal Protection or Due Process Clause.

Plaintiffs' efforts to distinguish the Court's holding in *Ramirez* and call for this Court to overrule *Ramirez* are unpersuasive. Plaintiffs argue that *Ramirez* does not stand for the proposition that every possible felon disenfranchisement law is constitutional. They cite *Hunter v. Underwood*, 471 U.S. 222, 85 L. Ed. 2d 222, 105 S. Ct. 1916 (1985) and the Court's decision in *Ramirez* to remand the case to the California Supreme Court to determine whether the respondents have a valid claim that the county election officials' enforcement of the valid felon disenfranchisement violates the equal protection clause to support their contention that there all felony disenfranchisement laws are constitutional. However, this Court is bound by the Supreme Court's decision in *Ramirez*

which holds that ex-felons exclusion from not voting does not violate the Equal Protection Clause of the Constitution. 418 U.S. at 56, 94 S.Ct. 2655. Thus, the Court grants summary judgment to the State on Plaintiffs Equal Protection claim under the Fourteenth Amendment.

B. Plaintiffs' Claim that Felon Disenfranchisement Violates the First Amendment

Plaintiffs also contend that the felon disenfranchisement provision violates the First Amendment as well. However, it is clear that the First Amendment does not guarantee felons the right to vote. *See Howard v. Gilmore*, 2000 U.S. App. LEXIS 2680, No. 99-2285, 2000 WL 203984, at *2 ("The First Amendment creates no private right of action for seeking reinstatement of previously cancelled voting rights."); *see also, Farrakhan v. Locke*, 987 F. Supp. 1304 (E.D.Wash.1997) (holding that to hold the same Constitution that specifically recognizes felon disenfranchisement under § 2 of the Fourteenth Amendment but also prohibits disenfranchisement under another amendment would be to interpret the Constitution in an inconsistent manner). This Court agrees with the holding of *Howard* and concludes that Plaintiffs do not have a cause of action under the First Amendment.

C. Plaintiffs' Claim of Intentional Race Discrimination

Plaintiffs also claim that Florida's felon disenfranchisement law violates the Equal Protection Clause of the Fourteenth Amendment by intentionally discriminating against them because of their race. To succeed on this claim,

Plaintiffs must establish that the Florida felon disenfranchisement provision was framed and ratified with a discriminatory purpose. *See e.g., Washington v. Davis,* 426 U.S. 229, 240, 48 L. Ed. 2d 597, 96 S. Ct. 2040 (1976) ("basic equal protection principle [is] that the invidious quality of a law claimed to be racially discriminatory must ultimately be traced to a racially discriminatory purpose.") "Discriminatory purpose" implies more than intent as volition or intent as awareness of consequences; it implies that the decision maker selected a particular course of action at least in part "because of," not merely, "in spite of," its adverse effects upon an identifiable group. *Pers. Adm'r of Mass. v. Feeney,* 442 U.S. 256, 279, 60 L. Ed. 2d 870, 99 S. Ct. 2282 (1979) (footnote and citation omitted). To this end, Plaintiffs have presented to this Court an abundance of expert testimony about the historical background of Florida's felon disenfranchisement scheme as historical evidence that the policy was enacted originally in 1868 with the particular discriminatory purpose of keeping blacks from voting.

As a matter of law, however, the re-enactment of the felon disenfranchisement provision in 1968 cleansed Florida's felon disenfranchisement scheme of any invidious discriminatory purpose that may have prompted its inception in Florida's 1868 Constitution. The Fifth Circuit holding in *Cotton v. Fordice,* 157 F.3d 388 (5th Cir.1998) is persuasive. In *Cotton,* the Fifth Circuit dismissed a constitutional challenge to the felon disenfranchisement provision of Mississippi's Constitution. The *Cotton* plaintiff argued that the provision was unconstitutional because it was originally drafted with the intent to disenfranchise blacks and was motivated by the desire to discriminate against blacks on

account of race. While this Court has been vocal in its condemnation of any law created with the invidious purpose to discriminate against minorities, it agrees with the Fifth Circuit that "a facially neutral provision . . . might overcome its odious origin." *Id.* at 391. Further, a new provision may supersede the previous provision and remove the discriminatory taint associated with the original version.

Plaintiffs, nonetheless, urge this Court to look at the intent of those enacting the felon disenfranchisement provision of the 1868 Constitution. They argue that an Equal Protection analysis should not allow a discriminatory law to evade scrutiny merely because it is re-enacted by a later legislative body with mere cosmetic changes and without any comment or legislative consideration. According to Plaintiffs, the felon disenfranchisement provision have not been adequately deliberated since 1868 and all revisions to it have been stylistic rather than substantive. To an extent, Plaintiffs are correct. A subsequent re-enactment of a discriminatory law can only be cleansed if the re-enacted law emerges from a deliberative process. *See id.* However, the Court finds that the record surrounding the re-enactment of Florida's felony disenfranchisement provision in 1968 clearly indicates that significant deliberations and substantive changes were made by the Florida legislature to the felon disenfranchisement provision in 1968.

It is undisputed that in 1965, Florida's Legislature created a Constitutional Revision Committee (the "CRC") to consider and devise recommendations for revisions to Florida's Constitution. The 1968 revision process was designed to completely overhaul the state constitution.

App. 3 (Scher Rep. 3). The CRC, in turn, formed a Subcommittee on Suffrage and Elections which had authority over the felon disenfranchisement provision. The Subcommittee met twelve times before proposing a revised felon disenfranchisement provision. *See* App. To Defs' Mot. Dismiss 795, 803 (Scher Dep. 11-2; 42-3). Both houses of the Florida legislature approved the revised Constitution as proposed by the CRC and placed the document on the 1968 ballot. The Constitution proposed by the CRC was then approved by Florida's electorate in November of 1968, fourteen months after adoption by the legislature. Thus, the record suggests that the adoption of felon disenfranchisement provision only came about after significant deliberation.

There is a public record of the Subcommittee considering the provision on February 2 and 3, 1966 that support the conclusion of significant deliberation of this provision by the Constitutional Revision Committee of 1965. The relevant minutes of the meetings state:

> Mr. Earle moved that Article VI, Section 4 be adopted by the Committee on Suffrage and Elections. The motion was seconded.
>
> Mr. Pettigrew moved to amend Mr. Earle's motion by striking "judicially determined to be of unsound mind, or under judicial guardianship because of mental disability" and to substitute therefor "persons adjudicated mentally incompetent." This motion was seconded and passed.

Mr. Pettigrew moved to further amend Section 4 by adding to his previous amendment: "in this or any other state and who have not had their competency judicially restored." This amendment was seconded and also passed.

After considerable discussion, Mr. Pettigrew moved that Section 4 be deleted and the following inserted: "The Legislature may by law establish disqualifications for voting for mental incompetency or conviction of a felony." The motion was seconded.

Mr. Goodrich offered the following substitute motion to Mr. Pettigrew's motion: Delete Section 4 and insert: "The Legislature may by law exclude persons from voting because of mental incompetence or commitment to a jail or penal institution." After discussion, Mr. Goorich's [sic] motion failed for lack of a second.

The vote was taken on Mr. Pettigrew's motion, but it failed adoption.

Mr. Goodrich moved that the word "felony" in line 2 of Section 4 be changed to "crime." The motion failed for lack of a second.

The Committee adopted Section 4 of Article VI with no further amendments. (Suffrage and Elections Committee Meeting, February 2 and 3, 1966, pp. 6-7.)

The felon disenfranchisement provision that was passed by the Subcommittee after significant consideration, accepted by the legislature after deliberations between legislators, and ultimately adopted by Florida's voters without any evidence of discussion of discriminatory intent based upon race.

The provision of 1968 did more than reflect mere "cosmetic" changes but contained substantially revisions to the 1885 law. The framers and ratifiers of the 1968 Constitution deliberately chose to change the prohibition on voting by felons in order to achieve a different and new result in terms of the persons who would be disqualified. The 1968 Constitution altered Article VI, Section 4, of the 1885 Constitution to categorically disqualify felons not only from voting but also from holding office. Additionally, it changed Article VI, Section 5, of the 1885 Constitution by deleting specific crimes that would have triggered disqualification including some misdemeanors. *See, e.g., State ex rel. Jordan v. Buckman,* 18 Fla. 267 (1881) (holding misdemeanor conviction for petty larceny triggered disenfranchisement). Thus, the legislature in 1986 disqualified a different category of person than its predecessors.

Plaintiffs at most have presented evidence to suggest that Florida's felon disenfranchisement policies were racially motivated in 1868. However, they have not presented any evidence that the legislature that enacted the felon disenfranchisement provision in 1968 did so to discriminate against African Americans. Without any evidence that Florida's disenfranchisement law enacted in 1968 was motivated by racial animus and with evidence that Florida's legislature significantly deliberated and substantively revised

to the Florida's 1868 disenfranchisement law, the Court grants summary judgment in favor of the State on Plaintiffs' claim of intentional racial discrimination.

D. Plaintiffs' Claim of Violation of Section 2 of the Voting Rights Act

Plaintiffs claim that Florida's felon disenfranchisement provision violates Section 2 of the Voting Rights Act of 1982, 42 U.S.C. § 1973 by denying African Americans suffrage based on their race and color. Section 2 prohibits the State from enforcing any "qualification or prerequisite to voting or standard, practice, or procedure" that "results in a denial or abridgement of the right of any citizen of the United States to vote on account of race or color." 42 U.S.C. § 1973(a). Under this "results" standard, Plaintiffs do not need to prove that the felon disenfranchisement provision was adopted with a racially discriminatory purpose, *see Thornburg v. Gingles*, 478 U.S. 30, 35, 92 L. Ed. 2d 25, 106 S. Ct. 2752 (1986), but that under the totality of the circumstances, the political process are not equally open to participation by members of a protected class in that its members have less opportunity than other members of the electorate to participate in the political process. *See Burton v. City of Belle Glade*, 178 F.3d 1175, 1198 (11th Cir.1999) (quoting 42 U.S.C. § 1973(b)).

The Court finds *Wesley v. Collins*, 605 F. Supp. 802 (M.D. Tenn. 1985) to be instructive. In *Wesley*, the *pro se* plaintiff brought suit in federal court under the Voting Rights Act challenging a Tennessee law that deprived him of his right to vote while he served a plea-bargained suspended sentence. The *Wesley* court dismissed the plaintiff's claim

on the grounds that the *pro se* plaintiff had failed to show a causal connection between the indicia of historically-rooted discrimination and the statute disenfranchising felons. *See id.* at 812. Therefore, to establish a Voting Rights Act violation, there must be a nexus between the discriminatory exclusion of blacks from the political process and the disenfranchisement of felons.

Furthermore, the Eleventh Circuit indicated that the existence of some form of racial discrimination remains the cornerstone of section 2 claims. *See Nipper v. Smith,* 39 F.3d 1494, 1515 (11th Cir.1994) (*en banc*) (Tjoflat, C.J., plurality opinion). Judge Tjoflat recognized that the deprivation of a minority group's right to equal participation in the political process must be on account of a classification, decision, or practice that depends on race or color, not on account of some other racially neutral cause. *See Solomon v. Liberty County Comm'rs,* 221 F.3d 1218, 1225 (11th Cir. 2000) (*en banc*) (quoting *Nipper,* 39 F.3d at 1515). Thus, no Section 2 violation occurs when factors other than race caused election results with a disparate impact on minorities. *See Southern Christian Leadership Conference v. Sessions,* 56 F.3d 1281, 1293 (11th Cir. 1995) (*en banc*).

Here, it appears that African American ex-felons in Florida have less opportunity than similarly situation nonminorities on account of a racially neutral cause. The African American ex-felon Plaintiffs have not been denied the right to vote because an immutable characteristic but because of their own criminal acts. This is also true of the non-African American class members. Thus, it is not racial discrimination that deprives felons, black or white, of their

right to vote but their own decision to commit an act for which they assume the risks of detection and punishment. *See Wesley v. Collins*, 605 F. Supp. 802, 813 (M.D. Tenn. 1985) *aff'd* 791 F.2d 1255 (6th Cir. 1986).

Plaintiffs point to the statistics of Florida's criminal justice system as evidence that it is infected by racism. While this court decries any racism that exists with Florida's criminal justice system, the case law indicates that this evidence of disproportionate impact is irrelevant to the voting rights challenge. In *Farrakhan v. Locke*, No. 96-76-RHW (E.D. Wash. 2000), the court held that even compelling evidence of bias in the administration of the criminal justice system failed to establish a claim for vote denial because even if the disproportionate numbers of minorities disenfranchised were the product of discriminatory animus on the part of prosecutors and judicial officials, Washington's felon disenfranchisement scheme would not violate Section 2 because it is discrimination in the criminal justice system, not the disenfranchisement provision itself, that causes the vote denial. *See id.* at *6.("At most, this establishes a flaw with the criminal justice system, not with the disenfranchisement provision."). "The mere fact that many incarcerated felons happen to be black and Latino is insufficient grounds to implicate the Fifteenth Amendment or the Voting Rights Act." *Id.* In rejecting a similar claim, the Sixth Circuit stated that "it is well-settled . . . that a showing of disproportionate racial impact alone does not establish a per se violation of the Voting Rights Act." *Wesley*, 791 F.2d at 1260-61.

The Court thus finds that Plaintiffs have failed to make the requisite showing that they are denied the right to vote on account of race rather than some racially neutral cause. *See Solomon*, 221 F.3d at 1225. Plaintiffs have, in effect, disenfranchised themselves by committing a felony. *See Wesley*, 605 F. Supp. at 813 ("The law presumes that all men know its sanctions. Accordingly, the performance of a felonious act carries with it the perpetrator's decision to risk disenfranchisement."). Therefore, the State is entitled to summary judgment in their favor on Plaintiffs' Section 2 claim.

E. Plaintiffs' Poll Tax and Wealth Qualification Claims

Plaintiffs' final claims allege that the requirement of the Clemency Board for applicants to pay all victim restitution, to be eligible for restoration of civil rights, constitutes an impermissible poll tax. At the time this case was filed, the State's rules predicated clemency on payment of criminal fines in excess of $1,000, and on payment of all victim restitution. In June, 2001, the Clemency Rules were modified to eliminate the prerequisite that fines in excess of $1,000 be paid prior to restoration of civil rights but retained the requirement that victim restitution be paid before clemency can be granted and voting rights restored.

Plaintiffs argue that the Fourteenth and Twenty-Fourth Amendments to the United States Constitution and section 10 of the Voting Rights Act, 42 U.S.C. § 1973h, do not permit the State to use ex-felon's financial status to deny them the right to vote, regardless of the other requirements that the state may require before granting restoration of civil rights.

They assert that the imposition of financial conditions on regaining the right to vote constitutes a practical equivalent of a poll tax.

Plaintiffs correctly argue that access to the franchise cannot be made to depend upon an individual's financial resources. The Supreme Court has struck down numerous voting qualifications that conditioned voting or other political participation on payment of special fees, *see Lubin v. Panish*, 415 U.S. 709, 39 L. Ed. 2d 702, 94 S. Ct. 1315 (1974) (candidate filing fee); *Harper v. Virginia State Bd. of Elections*, 383 U.S. 663, 16 L. Ed. 2d 169, 86 S. Ct. 1079 (1966) ($1.50 poll tax); *Harman v. Forssenius*, 380 U.S. 528, 14 L. Ed. 2d 50, 85 S. Ct. 1177 (1965) (certificate of residence or poll tax), or holding of property, *see Hill v. Stone*, 421 U.S. 289, 44 L.Ed.2d 172, 95 S.Ct. 1637 (1975) (property available for taxation); *Cipriano v. City of Houma*, 395 U.S. 701, 23 L. Ed. 2d 647, 89 S. Ct. 1897 (1969) (striking property ownership requirement for utility bond election). These qualifications constituted unconstitutional poll taxes by placing barriers on persons qualified to vote and their actual exercise of their right to vote.

An unconstitutional poll tax, like those in the cases cited by the Plaintiffs, pertain to a tax (or the functional equivalent in the case of property ownership) directly burdens the exercise of an individual's proper exercise of their right to vote. As previously stated in this order, the State has permissibly stripped Plaintiffs of their right to vote along with other civil rights pursuant to their felony convictions. The State is not constitutionally obligated to return this right

to them on completion of their sentence.[2] The victim restitution requirement, then, does not unduly burden the exercise of their right to vote given that that right has already been stripped from them. The victim restitution requirement is not a special fee that they must pay in order to exercise a right already existing in them, but a requirement made within the authority of the State to begin the process of having their civil rights fully restored. *See Howard v. Gilmore*, No. 99-2285, 2000 WL 203984, at *2 (4th Cir. Feb 23, 2000) (affirming the dismissal of a claim that Virginia's practice of requiring felons to pay a $10 fee to the Circuit Court of Richmond in order to begin the process of having his civil rights restored did not constitute an unconstitutional poll tax in violation of the Twenty-Fourth Amendment). It is not Plaintiffs' right to vote which payment of a victim restitution is being conditioned but rather it is the restoration of his civil rights which is being conditioned. *See id.*

Moreover, the State of Florida has created an administrative mechanism through which disenfranchised felons who are unable to satisfy the prerequisites for restoration of their civil rights, including restoration of their right to vote, may obtain a waiver of this prerequisite. An applicant for restoration of civil rights can request a waiver of this condition. *See* Fla. R. Exec. Clem. 8. Thus, Plaintiffs' right to vote is not necessarily "denied or abridged . . . by reason of failure to pay any poll tax or other tax." U.S. Const. amend. XXIV.

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2. In fact, the court notes that at least 12 states offer ex-felons no opportunity or avenue by which they can have their voting rights restored to them. *McGrath v. United States*, 60 F.3d 1005, 1008 (2d Cir. 1995).

The Court finds that victim restitution is a crucial part of the debt the convicted felon owes to both the victim and society. Payment of that debt is directly related to the question of the applicant's rehabilitation and readiness to return to the electorate. The Clemency Board's requirement that applicants pay all victim restitution furthers rehabilitation and readiness for return to the electorate. Plaintiffs must complete their sentences, including payment of restitution, or seek a waiver, before being restored to the electorate. Accordingly, the State is entitled to summary judgment in their favor on Plaintiffs' poll tax claims.

IV. CONCLUSION

After a careful review of the record and the Court being otherwise fully advised, it is ORDERED, ADJUDGED and DECREED that Defendants' Motion for Summary Judgment be, and the same is hereby, GRANTED. The above-styled case is DISMISSED with prejudice.

ORDER DENYING PLAINTIFFS' MOTION TO SUPPLEMENT RECORD, UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF FLORIDA, MIAMI DIVISION, DATED MAY 30, 2002

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA
MIAMI DIVISION

CASE NO. 00-3542-CIV-KING

THOMAS JOHNSON, et al.,

Plaintiffs,

v.

JEB BUSH, et al.,

Defendants.

ORDER DENYING PLAINTIFFS' MOTION TO SUPPLEMENT RECORD

THIS CAUSE is before the Court on Plaintiffs' Motion to Supplement Record filed May 23, 2002. Defendants filed a Response on May 28, 2002. Plaintiffs seek to supplement the record after summary judgment briefing has been completed with evidence that was never identified or furnished to Defendants during discovery (now long complete), was not referenced in the summary judgment briefs, and was not designated as a possible trial exhibit in the Joint Pretrial Stipulation. Accordingly, after a careful

review of the record and the Court being otherwise fully advised, it is

ORDERED and ADJUDGED that Plaintiffs' Motion to Supplement Record [D.E. 232] be, and the same is hereby, DENIED.

DONE and ORDERED in chambers at the James Lawrence King Federal Justice Building and United States Courthouse, Miami, Florida, this 30th day of May, 2002.

s/ James Lawrence King
JAMES LAWRENCE KING
UNITED STATES DISTRICT JUDGE
SOUTHERN DISTRICT OF FLORIDA

ORDER GRANTING IN PART, DENYING IN PART, MOTION TO EXCLUDE EXPERT RICHARD ENGSTROM, UNITED STATES DISTRICT COURT OF FLORIDA, MIAMI DIVISION, DATED APRIL 18, 2002

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA
MIAMI DIVISION

CASE NO. 00-3542-CIV-KING

THOMAS JOHNSON, et al.,

Plaintiffs,

v.

JEB BUSH, et al.,

Defendants.

ORDER GRANTING IN PART CLEMENCY BOARD MEMBERS' MOTION *IN LIMINE* TO EXCLUDE PROPOSED TESTIMONY OF RICHARD ENGSTROM

THIS CAUSE is before the Court upon Defendants Clemency Board Members' Motion to Proposed Testimony of Richard Engstrom [D.E. 134]. Plaintiffs filed a Response on February 6, 2002. Defendants filed a Reply on February 8, 2002. The Court heard argument on the motion on April 5, 2002.

I. LEGAL STANDARD

The Federal Rules of Evidence—especially Rule 702—assign to the trial judge the gatekeeping role of "ensuring that an expert's testimony both rests on a reliable foundation and is relevant to the task at hand." *Daubert v. Merrell Dow Pharm., Inc.*, 509 U.S. 579, 597 (1993). This obligation applies not only to scientific evidence, but to all expert testimony. *See Kuhmo Tire Co. v. Carmichael*, 526 U.S.137,141 (1999). The inquiry under Rule 702 is a flexible one. *See Daubert*, 509 U.S.at 594. The trial court is afforded substantial deference in its performance of that inquiry. *See Gen. Elec. Co. v. Joiner*, 522 U.S.136, 143 (1997). "The burden of laying the proper foundation for the admission of the expert testimony is on the party offering the expert, and the admissibility must be shown to be a preponderance of the evidence." *Allison v. McGhan Med. Corp.*,184 F.3d 1300, 1306 (11th Cir. 1999).

II. DISCUSSION

Plaintiffs offer Professor Engstrom as a voting rights expert. Professor Engstrom seeks to offer evidence on racially polarized voting. He also seeks to testify on the socioeconomic differences that exist between blacks and whites and their effects on voter participation.

A. Evidence of Racially Polarized or Bloc Voting

Defendants have moved to exclude Professor Engstrom's testimony concerning racial bloc voting based on relevancy and methodology. Defendants argue that Professor

Engstrom's analysis has no legal relevance to this case. Further, Defendants attack Professor Engstrom's methodology on three separate grounds. Defendants argue Professor Engstrom's methodology: (1) cannot be squared with binding precedent; (2) relies on insufficient data; (3) and rests on a legally flawed definition of racially polarized voting.

To be admissible, expert testimony must "assist the trier of fact to understand the evidence or to determine a fact in issue . . . ." Fed. R. Evid. 702. "This condition goes primarily to relevance." *Daubert*, 509 U.S.at 591. As the Supreme Court has recognized, this "consideration has been aptly described by Judge Becker as one of 'fit.'" *Id.* at 591, citing *United States v. Downing*, 753 F.2d 1224, 1242 (3d Cir. 1985). Therefore, the Court must determine whether Professor Engstrom's proposed testimony "fits" in this case.

To fit, the proposed expert testimony must be "relevant to the task at hand, . . . [in] that it logically advances a material aspect of the proposing party's case." *Allison*, 184 F.3d at 1312 (internal quotations omitted). Plaintiffs argue that Professor Engstrom's testimony is relevant because it 'provides the Court with an understanding of the social and political context in which the felony disenfranchisement law operates." Pls.' Opp'n at 16.

Section 2 of the Voting Rights Act states that violations of the section are to be proven based on the "totality of the circumstances." 42 U.S.C. § 1973(b) (2000). The Senate Judiciary Committee majority Report accompanying the 1982 amendment to Section 2 provides a list of factors that may

be probative of a violation of this section. S. Rep. No. 97-417, at 28-29 (1982), *reprinted in* 1982 U.S.C.C.A.N. 177, 206. Among these factors is "the extent to which voting in the elections of the state or political subdivision is racially polarized." *Id.*

Not all factors, however, will fit in every case. *See Thornburg v. Gingles*, 478 U.S. 30, 45 (1986) ("[T]he enumerated factors will often be pertinent to certain types of § 2 violations, particularly to vote dilution claims. . . ."). The Senate Report itself states that "[t]o establish a violation, plaintiffs could show a variety of factors, depending upon the kind of rule, practice, or procedure called into question." S. Rep. at 28,1982 U.S.C.C.A.N. at 206.

This case does not involve a vote dilution claim. Rather, Plaintiffs' claims are based on vote denial. Professor Engstrom does not analyze the voting pattern of the plaintiff class or of all felons who have not had their civil rights restored; nor can he because they currently cannot vote. The Court finds that an exploration of racially polarized or bloc voting does not fit in this case. Professor Engstrom's testimony on this point will not assist the Court to understand the evidence or to determine a fact in issue. *See* Fed. R. Evid. 702. Nor will the testimony logically advance a material aspect of Plaintiffs' case. *See Allison*, 184 F.3d at 1312. Accordingly, Professor Engstrom's testimony on racially polarized voting will be excluded on this ground and the Court need not pass on his methodology.

B. Evidence of Socioeconomic Conditions

Professor Engstrom also included in his report information regarding the socioeconomic characteristics of Florida's African-American residents. Specifically, his testimony deals with the disparate levels of educational attainment and income between black and non-black Floridians. This relates to another factor identified in the Senate Report: "the extent to which members of the minority group . . . bear the effects of discrimination in such areas as education, employment and health, which hinder their ability to participate effectively in the political process." S. Rep. at 29, 1982 U.S.C.C.A.N. at 206.

Defendants argue that this testimony should be excluded because Professor Engstrom "simply parroted the statistics presented in the 1990 census." Defs.' Mot. at 13. Defendants have not offered any reason to suggest that the census data is unreliable; nor have they suggested that this type of census data is not one that is reasonably relied on by experts. Professor Engstrom does not merely recite census data. Rather he seeks to use his specialized knowledge to assist the Court to understand the implications and significance of this data with respect to socioeconomic disparities and voter participation. *See* Fed. R. Civ. P. 702. These socioeconomic disparities in levels of educational attainment and income affect the plaintiff class. This testimony properly fits in this case and is admissible.

III. CONCLUSION

Accordingly, after a careful review of the record and the Court being otherwise fully advised, it is

ORDERED and ADJUDGED that Defendants Clemency Board Members' Motion to Exclude Proposed Testimony of Richard Engstrom [D.E. 134] be, and the same is hereby, GRANTED in part and DENIED in part. Professor Engstrom's testimony regarding racially polarized voting is hereby EXCLUDED. Professor Engstrom will be allowed to offer testimony regarding socioeconomic disparities in Florida.

DONE and ORDERED in chambers at the James Lawrence King Federal Justice Building and United States Courthouse, Miami, Florida, this 18th day of April, 2002.

s/ James Lawrence King

JAMES LAWRENCE KING
UNITED STATES DISTRICT JUDGE
SOUTHERN DISTRICT OF FLORIDA

ORDER GRANTING MOTION TO EXCLUDE EXPERT RICHARD SCHER, UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF FLORIDA, MIAMI DIVISION, DATED APRIL 18, 2002

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA
MIAMI DIVISION

CASE NO. 00-3542-CIV-KING

THOMAS JOHNSON, et al.,

Plaintiffs,

v.

JEB BUSH, et al.,

Defendants.

ORDER GRANTING CLEMENCY BOARD DEFENDANTS' MOTION *IN LIMINE* TO EXCLUDE THE EXPERT REPORT AND TESTIMONY OF RICHARD SCHER

THIS CAUSE is before the Court on Clemency Board Defendants' Motion *In Limine* to Exclude the Expert Report and Testimony of Richard Scher [D.E. 131]. Plaintiffs filed a Response on February 6, 2002. Defendants filed a Reply on February 8, 2002. The Court heard argument on the motion on March 25, 2002.

I. LEGAL STANDARD

The Federal Rules of Evidence—especially Rule 702—assign to the trial judge the gatekeeping role of "ensuring that an expert's testimony both rests on a reliable foundation and is relevant to the task at hand." *Daubert v. Merrell Dow Pharm., Inc.*, 509 U.S. 579, 597 (1993). This obligation applies not only to scientific evidence, but to all expert testimony. *See Kuhmo Tire Co. v. Carmichael*, 526 U.S. 137, 141 (1999). The inquiry under Rule 702 is a flexible one. *See Daubert*, 509 U.S. at 594. The trial court is afforded substantial deference in its performance of that inquiry. *See Gen. Elec. Co. v. Joiner*, 522 U.S. 136, 143 (1997). "The burden of laying the proper foundation for the admission of the expert testimony is on the party offering the expert, and the admissibility must be shown to be a preponderance of the evidence." *Allison v. McGhan Med. Corp.*, 184 F.3d 1300, 1306 (11th Cir. 1999).

II. DISCUSSION

Plaintiffs offer Professor Scher as a voting rights and political science expert "to make sure that the Court has a clear record of what is available in the archives and what is known about the 1968 constitutional revision." March 25, 2002, Tr. at 70. Professor Scher seeks to offer his opinion that the modifications to the 1868 felony disenfranchisement provision in the 1968 Florida Constitution did not "cure" the provisions racist intent. He would opine that the changes to the provision do not demonstrate a sufficient deliberative process and are "revisions" having no legal effect, rather than "reforms."

In essence, Professor Scher wishes to present the legislative history of the 1968 provision and opine on its legal effect. This sort of an examination is well within the core competence of lawyers and Courts. This information would traditionally be presented to the Court by Plaintiffs' counsel in the form of legal argument. Professor Scher would advance the same argument under the guise of "expert opinion." This is not permissible. *See, e.g., In re: Initial Public Offering Sec. Litig.*, 174 F. Supp. 2d 61, 69 (S.D.N.Y. 2001) ("In our adversarial system, lawyers make arguments, judges write legal opinions—and there is no such thing as an expert opinion when it comes to interpreting [the law] unless that opinion belongs to a court.").

To be admissible, expert testimony must "assist the trier of fact to understand the evidence or to determine a fact in issue. . . ." Fed. R. Evid. 702. Professor Scher's proposed testimony on the legislative history of the 1968 Florida Constitution will not assist the trier of fact and will be excluded.[1]

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1. Professor Scher's proposed testimony is even less helpful to the trier of fact in a case such as this one that calls for a bench trial. *Cf. Burkhart v. Washington Metro. Area Trans. Auth.*, 112 F.3d 1207, 1213 (D.C. Cir. 1997) ("Each courtroom comes equipped with a "legal expert," called a judge. . . .").

III. CONCLUSION

Accordingly, after a careful review of the record and the Court being otherwise fully advised, it is

ORDERED and ADJUDGED that Clemency Board Defendants' Motion *In Limine* to Exclude the Expert Report and Testimony of Richard Scher [D.E. 131] be, and the same is hereby, GRANTED. Professor Scher's report and testimony is hereby EXCLUDED.

DONE and ORDERED in chambers at the James Lawrence King Federal Justice Building and United States Courthouse, Miami, Florida, this 18th day of April, 2002.

s/ James Lawrence King
JAMES LAWRENCE KING
UNITED STATES DISTRICT JUDGE
SOUTHERN DISTRICT OF FLORIDA

ORDER GRANTING IN PART MOTION TO EXCLUDE OUT-OF-TIME EVIDENCE, UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF FLORIDA, MIAMI DIVISION, DATED APRIL 4, 2002

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA
MIAMI DIVISION

CASE NO. 00-3542-CIV-KING

THOMAS JOHNSON, et al.,

Plaintiffs,

v.

JEB BUSH, et al.,

Defendants.

ORDER GRANTING IN PART CLEMENCY BOARD DEFENDANTS' MOTION TO EXCLUDE WITNESSES AND EVIDENCE IDENTIFIED OUT-OF-TIME

THIS CAUSE is before the Court upon Clemency Board Defendants' Motion to Exclude Witnesses and Evidence Identified Out-of-Time [D.E. 158]. Plaintiffs filed a Response on February 15, 2002. Defendants filed a Reply on February 25, 2002.

Defendants seek to exclude Professor James D. Ginger and the five reports by the Florida Supreme Court Racial and Ethnic Bias Study Commission (the "Commission Reports") on which he relies. Plaintiffs identified Professor Ginger as a proposed expert on January 18, 2002 — the day their Response to the Summary Judgment Motion was due. This is well after the deadline imposed by Fed. R. Civ. P. 26(a)(2)(C) and S.D. Fla. L.R. 16.1.K. Those rules require that expert reports be submitted ninety (90) days prior to pre-trial conference. In this case, pre-trial conference was set for February 15, 2002. Therefore, expert reports were due November 16, 2001.

Plaintiffs claim they understood the Court's October 31, 2001 Order that stated that a "resume of expert reports must be exchanged" seven days prior to the pre-trial conference to allow them to identify this new expert. This strained reading of the Order would allow a party to identify new experts well after the close of motion practice and not allow parties any opportunity to conduct discovery or obtain rebuttal experts. The Order simply provided a deadline to submit a resume or summary of the expert reports, it did not extend the time to submit the reports themselves. Accordingly, Professor Ginger and the Commission Reports on which he relies will be excluded under Fed. R. Civ. P. 37(c)(l).

Defendants also seek to exclude eleven fact witnesses (six of whom are Plaintiffs Hernandez, Hicks, Johnson, Robinson, Office, and Watson) based on Plaintiffs' failure to identify them in response to Defendants' Contention Interrogatories. The Court finds that Plaintiffs' counsel

informally disclosed to Defendants that they intended to call these six Plaintiffs as witnesses. Moreover, Defendants have deposed all six of these Plaintiffs. The Court will not exclude the six Plaintiff witnesses due to Plaintiffs counsels' failure to formally supplement the Response to Defendants' Contention Interrogatories. *See Coleman v. Keebler Co.*, 997 F. Supp. 1102, 1107 (N.D. Ind. 1998); *Benson v. Tocco, Inc.*, 113 F.3d 1203, 1208-09 (11th Cir. 1997). The five non-party witnesses were not disclosed to Defendants in a timely manner and will be excluded.

After a careful review of the record and the Court being otherwise fully advised, it is

ORDERED and ADJUDGED that Clemency Board Defendants' Motion to Exclude Witnesses and Evidence Identified Out-of-Time [D.E. 158] be, and the same is hereby, GRANTED in part. Professor Ginger, the Commission Reports on which he relies, and non-part witnesses Kraus, Jin, Li, Liu, and Thompson are hereby EXCLUDED.

DONE and ORDERED in chambers at the James Lawrence King Federal Justice Building and United States Courthouse, Miami, Florida, this 4th day of April, 2002.

s/ James Lawrence King

JAMES LAWRENCE KING
UNITED STATES DISTRICT JUDGE
SOUTHERN DISTRICT OF FLORIDA

FOURTEENTH AMENDMENT TO THE UNITED STATES CONSTITUTION

CONSTITUTION OF THE UNITED STATES OF AMERICA

AMENDMENT 14

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Section 2. Representatives shall be apportioned among the several States according to their respective numbers, counting the whole number of persons in each State, excluding Indians not taxed. But when the right to vote at any election for the choice of electors for President and Vice President of the United States, Representatives in Congress, the Executive and Judicial officers of a State, or the members of the Legislature thereof, is denied to any of the male inhabitants of such State, being twenty-one years of age, *(see Note 15)* and citizens of the United States, or in any way abridged, except for participation in rebellion, or other crime, the basis of representation therein shall be reduced in the proportion which the number of such male citizens shall bear to the whole number of male citizens twenty-one years of age in such State.

Section 3. No person shall be a Senator or Representative in Congress, or elector of President and Vice President, or hold any office, civil or military, under the United States, or under any State, who, having previously taken an oath, as a member of Congress, or as an officer of the United States, or as a member of any State legislature, or as an executive or judicial officer of any State, to support the Constitution of the United States, shall have engaged in insurrection or rebellion against the same, or given aid or comfort to the enemies thereof. But Congress may by a vote of two-thirds of each House, remove such disability.

Section 4. The validity of the public debt of the United States, authorized by law, including debts incurred for payment of pensions and bounties for services in suppressing insurrection or rebellion, shall not be questioned. But neither the United States nor any State shall assume or pay any debt or obligation incurred in aid of insurrection or rebellion against the United States, or any claim for the loss or emancipation of any slave; but all such debts, obligations and claims shall be held illegal and void.

Section 5. The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.

FIFTEENTH AMENDMENT TO THE UNITED STATES CONSTITUTION

CONSTITUTION OF THE UNITED STATES OF AMERICA

AMENDMENT 15

Section 1. The right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of race, color, or previous condition of servitude.

Section 2. The Congress shall have power to enforce this article by appropriate legislation.

SECTION 2 OF THE VOTING RIGHTS ACT, 42 U.S.C. § 1973

42 U.S.C. § 1973
(Voting Rights Act, Section 2)

(a) No voting qualification or prerequisite to voting or standard, practice, or procedure shall be imposed or applied by any State or political subdivision in a manner which results in a denial or abridgement of the right of any citizen of the United States to vote on account of race or color, or in contravention of the guarantees set forth in section 4(f)(2) of this title, as provided in subsection (b) of this section.

(b) A violation of subsection (a) is established if, based on the totality of circumstances, it is shown that the political processes leading to nomination or election in the State or political subdivision are not equally open to participation by members of a class of citizens protected by subsection (a) in that its members have less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice. The extent to which members of a protected class have been elected to office in the State or political subdivision is one circumstance which may be considered: *Provided*, That nothing in this section establishes a right to have members of a protected class elected in numbers equal to their proportion in the population.

FLORIDA CONSTITUTION OF 1868, ARTICLE XIV, SECTIONS 2, 4

FLORIDA CONSTITUTION OF 1868

ARTICLE XIV

Suffrage and Eligibility.

Section 2. No person under guardianship *non compos mentis*, or insane, shall be qualified to vote at any election, nor shall any person convicted of felony be qualified to vote at any election unless restored to civil rights.

* * *

Section 4. The Legislature shall have power and shall enact the necessary laws to exclude from every office of honor, power, trust, or profit, civil or military, within the State, and from the right of suffrage, all persons convicted of bribery, perjury, larceny, or of infamous crime, or who shall make or become, directly or indirectly, interested in any bet or wager, the result of which shall depend upon any election; or who shall hereafter fight a duel, or send or accept a challenge to fight, or who shall be a second to either party, or be the bearer of such challenge or acceptance; but the legal disability shall not accrue until after trial and conviction by due form of law.

FLORIDA CONSTITUTION OF 1885, ARTICLE VI, SECTIONS 4, 5

Florida Constitution of 1885

ARTICLE VI

Suffrage and Eligibility.

Section 4. No person under guardianship, *non compos mentis* or insane shall be qualified to vote at any election, nor shall any person convicted of felony by a court of record be qualified to at any election unless restored to civil rights.

* * *

Section 5. The Legislature shall have power to, and shall, enact the necessary laws to exclude from every office of honor, power, trust or profit, civil or military, within the State, and from the right of suffrage, all persons convicted of bribery, perjury, larceny, or of infamous crime, or who shall make, or become directly or indirectly interested in, any bet or wager, the result of which shall depend upon any election; or that shall hereinafter fight a duel or send or accept a challenge to fight, or that shall be a second to either party, or that shall be the bearer of such challenge or acceptance; but the legal disability shall not accrue until after trial and conviction by due form of law.

FLORIDA CONSTITUTION OF 1968, ARTICLE VI, SECTION 4

FLORIDA CONSTITUTION OF 1968

ARTICLE VI

Suffrage and Elections.

Section 4. Disqualifications. No person convicted of a felony, or adjudicated in this or any other state to be mentally incompetent, shall be qualified to vote or hold office until restoration of civil rights or removal of disability.

OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT, *HOWARD v. GILMORE*, DECIDED FEBRUARY 23, 2000 (UNPUBLISHED)

UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

No. 99-2285

WILLIAM HOWARD,

Plaintiff-Appellant,

v.

JIM GILMORE, Governor, State of Virginia;
J. KIRK SHOWALTER, Registrar,
City of Richmond, Virginia,

Defendants-Appellees.

Submitted Jan. 25, 2000.
Decided Feb. 23, 2000.

Appeal from the United States District Court for the Eastern District of Virginia, at Richmond.
Robert E. Payne, District Judge.
(CA-99-329-R).

Before WIDENER, MURNAGHAN, and MICHAEL, Circuit Judges.

OPINION

PER CURIAM.

William Howard appeals the district court's order summarily dismissing his complaint for failure to state a claim upon which relief can be granted. We review de novo summary dismissals under Fed. R. Civ. P. 12(b)(6). *See Schatz v. Rosenberg*, 943 F.2d 485, 489 (4th Cir. 1991). Finding no error, we affirm.

Howard complains that under Virginia law, his disenfranchisement as a convicted felon violates the First, Fourteenth, Fifteenth, Nineteenth and Twenty-fourth amendments to the United States Constitution, as well as the Civil Rights Act of 1964, 42 U.S.C. § 2000 (1994), and the Voting Rights Act of 1965, 42 U.S.C. §§ 1971, 1973 (1994).

Howard first complains that cancellation of his voting privileges violates the First Amendment. The First Amendment creates no private right of action for seeking reinstatement of previously canceled voting rights. Therefore, the district court correctly dismissed Howard's claim to the extent it was founded upon the First Amendment.

As for Howard's claims under the Fourteenth and Fifteenth Amendments, in order to state a claim, Howard must establish that the Commonwealth's decision to disenfranchise felons was motivated by race. *See Personnel Adm'r of Massachusetts v. Feeney*, 442 U.S. 256, 279 (1979); *Washington v. Davis*, 426 U.S. 229, 238-41 (1976). The

Commonwealth's decision to disenfranchise felons pre-dates the adoption of both constitutional amendments as well as the extension of the franchise to African-Americans. *See* Va. Const. art. 3, § 14 (1830). Moreover, the Fourteenth Amendment itself permits the denial of the franchise upon criminal conviction. *See* U.S. Const. amend. XIV, cl. 2. Howard has therefore failed to state a claim under either amendment. *See Richardson v. Ramirez*, 418 U.S. 24, 54 (1974); *Perry v. Beamer*, 933 F.Supp. 556, 558 (E.D.Va.1996), *aff'd*, 99 F.3d 1130 (4th Cir. 1996).

To the extent that Howard relies upon the Voting Rights Act of 1965(VRA), 42 U.S.C. §§ 1971, 1973 (1994), he fails to state a claim upon which relief can be granted. Under the VRA, a plaintiff must establish that the Commonwealth's act either was intended to, or had the effect of, abridging or denying the right to vote based upon race. *See Thornburg v. Gingles*, 478 U.S. 30, 35 (1986). As noted above, Virginia's exclusion of felons from the franchise pre-dates the enfranchisement of African-Americans. *See* Va. Const. art. 3, § 14 (1830). Moreover, Howard has failed to plead any nexus between the disenfranchisement of felons and race. He has therefore failed to state a claim under the VRA. *See Wesley v. Collins*, 605 F.Supp. 882, *aff'd*, 791 F.2d 1255 (6th Cir. 1996).

To the extent that Howard relies upon the Nineteenth Amendment, he fails to state a claim upon which relief can be granted. The Nineteenth Amendment prohibits denying the franchise based upon the basis of sex. *See Williams v. Rhodes*, 393 U.S. 23, 29 (1968). Howard makes no attempt to frame his claim in terms of discrimination based upon

sex. The Nineteenth Amendment is therefore inapplicable and the district court correctly dismissed the complaint to the extent it relies upon the Nineteenth Amendment.

Howard also claims that Virginia's practice of requiring him to pay a $10 fee to the Circuit Court of Richmond in order to begin the process of having his civil rights fully restored (and hence his right to vote), is an unconstitutional poll tax in violation of the Twenty-fourth Amendment. To be sure, the Twenty-fourth Amendment prohibits conditioning the right to vote upon payment of a fee. *See Harper v. Virginia Bd. of Elections*, 383 U.S. 663, 668-69 (1966). In Howard's case, however, it is not his right to vote upon which payment of a fee is being conditioned; rather, it is the restoration of his civil rights upon which the payment of a fee is being conditioned. Consequently, Howard states no claim under the Twenty-fourth Amendment.

As to appellant's final contention, that Virginia is estopped from preventing him from voting because he has previously voted, the district court properly dismissed his complaint. Howard has produced no factual basis nor legal authority upon which an estoppel theory could be sustained. The district court did not therefore err in dismissing the complaint as to this contention.

We affirm the district court's order dismissing this action with prejudice. We dispense with oral argument because the facts and legal contentions are adequately presented in the materials before the court and argument would not aid the decisional process.

AFFIRMED.

EXPERT REPORT BY JERRELL H. SHOFNER, PH.D., DATED OCTOBER 24, 2001

Expert Report

by

Professor Jerrell H. Shofner, Ph. D.

Case: *Johnson v. Bush*
No. 00-CV-3542
U.S. District Court
Southern District of Florida
Judge James Lawrence King

I. *Introduction and Professional Qualifications*

I have been retained as an expert by counsel for the Plaintiffs in the above captioned litigation. I have prepared this report pursuant to Federal Rule of Civil Procedure 26(a)(2)(B).

I am Professor Emeritus of History at the University of Central Florida, Orlando, Florida, where I was chairman of the department for the first 20 of my 25 active years here and editor of the *Florida Historical Quarterly* for the last two. Before coming to UCF in 1972, I also taught at the University of Florida (1967-1968) and Florida State University (1968-1972). All of my formal higher education was at Florida State University from which I received the B. S. in history (1960), the M. S. in history (1961), and the Ph. D. in history (1963). My fields of research and teaching were Civil War and Reconstruction, Florida History, and Race Relations. I have also taught the U. S. Survey courses and Southern History. I have published widely in these fields.

I am the author of 10 books, co-author of two, and contributor of chapters to eight others. I have also contributed 60 articles to national, regional, and local journals, and encyclopedias. My *Nor Is It Over Yet: Florida in the Era of Reconstruction 1863-1877*, several of the other books, and many of the journal articles are on the subject of this report. A copy of my curriculum vitae is attached.

2. *I have reached the following opinions:*

Florida's 1865 Constitution, written by representatives of the slave-holding, plantation-owning class pursuant to President Andrew Johnson's plan of Reconstruction, and the so-called "Black Code" passed by the 1865-1866 legislature, discriminated against the black freedmen. That discrimination included the creation of new criminal offenses to the commission of which, according to one prominent legislator, the black freedmen were "addicted."

When President Johnson's program was overturned by Congress in 1867, the Reconstruction Acts required that blacks be included in a new electorate which would elect delegates to a new constitutional convention. As a result of that election, the 1868 Constitution was written by members of a newly formed, but badly divided, Republican Party. The first priority of one faction was to protect the newly enfranchised black freedmen and disfranchised ex-Confederates. Another faction was more interested in creating a new government favorable to economic development even if that meant making concessions to the old slave-holding class. Using extra-legal tactics, the latter faction was able to gain control of the convention and write a document that

was acceptable to the propertied class which had led Florida out of the Union in 1861. That document, which became Florida's 1868 Constitution, provided a legislative apportionment formula that discriminated against blacks, a provision that the governor appoint nearly all local officials, and the inclusion of ex-Confederates in the new electorate. It also included the criminal offenses of the 1865 Constitution, added larceny which had been defined by the 1865-1866 legislature, and expanded the scope of criminal disfranchisement by including all persons convicted of *felony* "unless restored to civil rights."

The felony disfranchisement provision of the suffrage article of the 1868 Constitution, dilution of votes by disproportionate representation and the limits on the number of elective officials were intentionally racially discriminatory as is demonstrated by the historical context in which the document was adopted.

My opinion is also that Florida used criminal law to target blacks especially in relation to those new crimes which were added in 1865 and 1868; that is, those crimes which whites believed that blacks were prone to commit. The offenses added in 1865 and 1868, as well as the criminal disfranchisement provision for them became the basis for denying blacks the vote. I further believe that these additions to the criminal laws offered a means of recreating the labor force that had been lost by the abolition of slavery. Blacks were arrested on flimsy charges of vagrancy or even invented crimes. They were then forced to work off their sentences. This use of the criminal law to control blacks and insure a labor force continued in Florida until well into the 20th century.

The racially discriminatory character of the criminal disfranchisement provisions of the 1868 Constitution continued through Reconstruction, through the adoption of the 1885 Constitution, and long afterward.

3. *Basis and Reasons for These Opinions.*

That the changes in the suffrage article of the 1868 Constitution, the dilution of black votes by disproportionate representation, and the limits on the number of elective officials were intentionally racially discriminatory is demonstrated by the historical context in which the document was adopted. Of particular relevance are:

a. Florida's Restriction of Black Suffrage in 1865,

b. Florida's Enactment of the Black Codes, the Failure of the County Criminal Court System, and Rejection of the 14th Amendment,

c. The History of the Adoption of the 1868 Constitution, its Dilution of Black Votes, and its Suffrage Article,

d. Florida's Use of Criminal Law to Target Blacks, and

e. The Effect of Criminal Disfranchisement on Blacks.

a. *Florida's Restriction of Black Suffrage in 1865.* President Lincoln's assassination one week after General Lee's surrender in April 1865 created a vacuum at a very

critical time. After taking the oath of office, President Andrew Johnson waited nearly two months before announcing a plan for restoring the former Confederate states to the Union. In the meantime, those on the scene in Florida were unable to wait. General John Newton, commander of the Florida district, asked planters to explain their new situation to the freedmen and work out a free labor system based—in the absence of money—on shares of the crops. While some freedmen tested their new status by leaving the plantations for the towns, most remained on the land and worked as they had always done. Headed by Colonel Thomas W. Osborn, the Freedmen's Bureau assisted in keeping the blacks at work and tried to supervise the new labor contracts.

In June 1865, President Johnson finally announced his plan of Reconstruction. He appointed William Marvin, a former federal judge from Key West and an antebellum Unionist, as provisional governor. To the dismay of "Radicals" in Congress, all ex-Confederates were allowed to keep their property by taking oaths of *future* loyalty to the United States. Governor Marvin was to register those whites who took the oath to vote for delegates to a constitutional convention. When those delegates wrote a constitution repudiating slavery and secession, abolishing all debts incurred in support of the rebellion, and recognizing all laws passed by Congress since 1861, Johnson would recognize Florida as restored to the Union. It was up to convention delegates to decide on the future of the freedmen who had only recently been their slaves. And, of course, it was up to Congress to decide whether to seat Florida's representatives.

Even while many Congressmen were vocal in their skepticism of Johnson's plan, Governor Marvin made promises to Floridians that were contingent upon its acceptance by those Congressmen. In October 1865, Marvin told the constitutional convention delegates what he had been telling audiences all over the state during the preceding two months. He said that slavery was gone and it was necessary to define in the constitution civil rights and political privileges of the freedmen. "The governing power is in the hands of the white race, but the colored race is to be free and the government is to be administered in such a manner as not to infringe on that freedom," he said.[1] After an explanation that freedom did not include political participation, he suggested that if the convention abolished slavery and provided guarantees for protecting the freedmen, Congress would be obliged to seat the state's senators and representatives, thus recognizing its restoration to the Union. He further stated that he could see no good in conferring the vote on freedmen since neither race was prepared for so radical a change.[2]

Having lived in Florida, where racial slavery was both law and custom, for 30 years, the New York-born Marvin believed he was presenting an honest estimate of the freedmen as well as of President Johnson's requirements. But, in doing so he implied promises that, in the long run, could not be kept. Charles E. Dyke, editor of the influential Tallahassee *Floridian*, applauded Marvin's speech, adding

1. Florida, *Journal of the Constitutional Convention of 1865*, p. 9.

2. *Ibid.*, pp. 9-11.

"but as the disability rests on the ground of general incapacity, the more solemn the appeal to the ruling class to see that those whom God has made their inferiors, shall not suffer from the misfortune."[3]

Even as some Radical Republicans were already deploring the unwillingness of Southern states to deal fairly—as they saw it—with the newly freed blacks, President Johnson's provisional governor had just told the Florida convention delegates that it was all right.

The convention quickly annulled the ordinance of secession, and, by a vote of 20 to 14, abolished slavery and involuntary servitude except as a punishment for crime. It reluctantly repudiated all debts incurred in supporting the Confederacy. In other matters, the convention limited suffrage, political office, and jury duty to white men. It also enacted a special ordinance, to be effective until the legislature could act, authorizing the arrest of vagrants who could be fined up to $500 or sold for labor for periods not exceeding one year.[4] Blacks were permitted to testify in cases *involving blacks only* (italics added). In apportioning legislative representation, the convention retained the antebellum three-fifths formula for counting blacks. Before adjourning, it called upon Governor Marvin to appoint three men to report to the first general assembly the amendments necessary to make the laws conform with the new constitution with special reference to blacks.

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3. Tallahassee *Weekly Floridian*, October 27, 1865.

4. *Constitution of 1865*, Ordinance 4.

b. *Florida's Enactment of the Black Code, the Failure of the County Criminal Court System, and Rejection of the 14th Amendment.*

On November 29,1865, the constitution was ratified and David S. Walker was elected governor. He had opposed secession, but went with his state, serving as a judge throughout the war. He was inaugurated on December 18, at the opening session of the legislature, nearly all of whose members agreed with the work of the recent convention. Addressing that body, Walker noted public reluctance to ratity the 13th Amendment. He thought that ratification of the amendment and "the disposition of the Justices of the Peace, Sheriffs, and Jurors, to do their duty impartially, according to law" would convince Congress to seat Florida's senators and congressman. As for black suffrage, "I am satisfied that this demand will never be made by the President . . . Nor do I think that this unjust demand will ever be made by Congress." Continuing, he said, "Of course we could never accede to the demand for negro suffrage, should it be made. . . . we are willing to yield every thing but honor and our consciences . . ." and "we could not give either an honest or a conscientious assent to negro suffrage." He went on to conclude that it would be better to remain out of the Union than to accede to such a demand.

(1) *Enactment of the Black Code.* After telling the 1865 legislature that Florida could never accept negro suffrage, Walker reminded those assembled that, as members of a superior race, they had a duty to provide for the freedmen who had been deprived of their peaceful and happy existence through no fault of their own. Walker had no doubt that his

position was fair. His outlook had been formed during a lifetime as a member of a slave-holding class that had developed an extensive legal and ideological framework for racial slavery. By the time Florida became a United States territory, racial slavery was justified on the ground that blacks were so inferior to other races that legal servitude was their natural condition. The belief carried over to the free blacks. Florida, like the other slave states, developed a legal slave code and extensive regulation of free blacks as well. The environmental conditions of slavery—prohibition of education, menial labor, lack of opportunity to develop family relations—reinforced the belief in the blacks' inferiority. After emancipation, many Floridians who considered themselves decent people also believed that whites and blacks could not live as free and equal citizens in an open society. Many accepted the end of slavery and were still concerned about how to adjust the state laws to meet the president's demands and at the same time salvage a system under which the whites with their responsibilities to the blacks, and the blacks with their natural limitations, could live.

Walker's address was followed by a report from the committee that Governor Marvin had previously appointed to make changes in the laws "with reference especially to the altered condition of the colored race."[5] The committee members were Charles H. Dupont, Mariano D. Papy, and Anderson J. Peeler.

Dupont was an ex-Confederate Supreme Court justice. Papy was a former Confederate with moderate views. Peeler

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5. Florida, *House Journal*, 1865, p. 58.

was a prominent ex-Confederate and unreconstructed rebel who denounced the president's Reconstruction plan while praising the institution of slavery.

Speaking for the committee, Peeler lamented the disappearance of that "benign, but much abused and greatly misunderstood institution of slavery" and offered a lengthy defense of the state's powers to discriminate between blacks and whites.[6] According to him the abolition of slavery had removed "that tribunal peculiarly adapted to the . . . punishment of the great majority of the minor offences *to the commission of which the great majority of this class of population is addicted* (italics added)."[7] To handle "the great increase of minor offences, which may be reasonably anticipated from the emancipation of the former slaves," he recommended "a tribunal, more local in its jurisdiction (than the existing Circuit Courts) and of greater promptness in its administration of the penalties of the law."[8] The legislature complied with "An act to establish and organize a County Criminal Court."[9]

The committee further recommended that an alternative to the customary fines and/or imprisonment for punishment of crime be supplemented by corporal punishment. The reason for this was that "To degrade a white man by

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6. *Ibid.*, pp. 65.

7. *Ibid.*, pp. 60-62.

8. *Ibid.*, p. 39.

9. *Laws of Florida*, 1865, pp. 20-21.

punishment, is to make a bad member of society and a dangerous political agent. To fine and imprison a colored man in his present pecuniary condition, is to punish the State instead of the individual.[10]

"An act to prescribe additional penalties for the commission of offences against the State, and for other purposes" "added the alternatives of standing in the pillory for an hour or whipping, not exceeding thirty-nine lashes on the bare back, or both, at the discretion of the jury."[11]

The "other purposes" of the above cited act were to enumerate a lengthy list of crimes—assault of a white female, burglary, house breaking, arson, possession of weapons, and many others—for which the alternative punishments were presumably suitable.

Section Two of that act created a new kind of larceny to clarify the common law with respect to the criminality of "severance from the freehold." Under the existing criminal code, the stealing and sale of loose cotton, corn or other products (previously handled by slave masters) was not a crime and would have been considered a civil matter under the common law. Peeler explained that "In view of the present condition of things, we think that this rule of the common law ought to be altered. . . ."[12] Accordingly, Section Two provided "That severance from the freehold of any

10. Florida, *House Journal*, 1865, pp. 60-62.

11. *Laws of Florida*, 1865, pp. 23-28.

12. Florida, *House Journal*, 1865, p. 63.

agricultural production or fixture, or any part thereof, and the felonious taking and carrying away of the same, shall be deemed and held to be larceny, and be punished as such."[13]

The newly defined crime of larceny, added to others already included in the criminal code, and all those named in "An act prescribing penalties for the commission of offences against the State, and for other purposes" were intended to address "the altered condition of the colored race."[14]

The committee also recommended, and the legislature enacted "An act to Punish Vagrants and Vagabonds." Similar to the temporary ordinance of the recent convention, it provided for the arrest of "able-bodied persons" who had no visible means of support. Those arrested could be sentenced to a year of labor or imprisonment."[15]

These and other acts addressing labor contracts, apprenticeship, marriage, taxation, the judicial system, and crime and punishment, together with the denial of their right to vote or to serve on juries, made blacks second class citizens. The laws were soon collectively referred to as the "Black Code." Together with those of some of the other former Confederate states, the discriminatory laws provided ammunition for the Radicals in Congress who were trying to defeat President Johnson's plan of Reconstruction and replace it with their own.

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13. *Laws of Florida*, 1865, p. 23.

14. Florida, *House Journal*, 1865, p. 58.

15. *Laws of Florida*, 1865, pp. 28-29.

With Florida and the other former Confederates states demonstrating their reluctance to accept the freedmen as citizens and the president apparently unwilling to intervene, Congress refused to seat the representatives of the seceded states and created a Joint Committee of Fifteen on Reconstruction to investigate and make recommendations. During early 1866, President Johnson vetoed a Civil Rights bill and another intended to extend the life of the Freedmen's Bureau. He further proclaimed the restoration of civil government in the South, thus undercutting the power of military commanders to protect the freedmen. His hard line alarmed many moderate Republicans who were still not ready to join the Radicals. Meanwhile, Floridians and other Southerners were providing evidence that something had to be done if the blacks were to be protected in their new freedom.

(2) *Failure of the County Criminal Courts.* The county criminal courts were absolutely incapable of dispensing justice in matters involving blacks and whites. White judges and juries were unwilling to accept the word of blacks and, beyond that, many seemed offended that freedmen would even question the actions of whites with whom they disagreed. Governor Walker worked with Bureau Assistant Commissioner Thomas Osborn—and later Major General John G. Foster—to provide justice, and there were some judges who tried to cooperate with him, but he was utterly unable to convince most white residents that it was in their interest to administer even-handed justice.

One example involved Elias Earle, a prominent Alachua County planter who came before the court for beating a freedman. He was found not guilty, and then sued the freedman for trespass. Testimony showed that the man had attended church on Earle's property. He was found guilty and sentenced to pay a fine and costs. Unable to pay, he was held in jail. The governor intervened and asked for the case record. It was accompanied by several affidavits alleging that the freedman was a notorious liar while Earle was above reproach. Walker declined to intervene and the court decision stood.

Alfred Jackson, a 17-year-old freedman, was convicted by the Bradford County criminal court of riding his employer's horse without permission. He was fined $200 that he did not have and was sold for his labor for three years to pay off the debt. In Alachua County a black girl accused Charles U. Taylor of striking her with a board. Three witnesses testified against Taylor, but he was acquitted. He then accused the girl of contract violation on grounds of insolence. She was convicted and given ten lashes.

These cases are representative of hundreds which occurred in the county criminal courts in 1866. General Foster, who had succeeded Colonel Osborn as head of the Freedmen's Bureau in Florida was ultimately obliged—despite President Johnson's proclamation—to reimpose martial law in several north Florida counties. Finally, in November 1866, he resigned his position and left the state in disappointment that he was unable, under existing laws, to protect citizens in the exercise of their rights.[16]

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16. Jerrell H. Shofner, *Nor Is It Over Yet*, p. 102.

(3) *Rejection of the 14th Amendment.* During 1866, relations between the president and Congress continued to worsen. At the recommendation of the Joint Committee, Congress passed the 14th Amendment to the U. S. Constitution. Having no choice but to send the amendment to the states for ratification, Johnson recommended that it be rejected.

Florida joined other former Confederate states in following the president's advice. The amendment's provisions are too well known to require restatement here, but the provision for reduction of representation in Congress in proportion to the number of adult males denied the right to vote forced Floridians to confront the issue to which they had repeatedly said they could not accede. A legislative committee on "Federal relations" denounced the amendment, complaining that "We must be shorn of our representation or give the inferior and unintelligent race the supremacy in the State government," and that "control of the Southern States by the negro would result either in a war of races or the emigration of one or the other race . . ."[17] Joined by Governor Walker, who said Floridians could never accept black suffrage, the committee recommended rejection of the amendment. The legislature agreed.[18]

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17. Florida, *House Journal*, 1866, p. 77.

18. Shofner, *Nor Is It Over Yet*, pp. 102-103.

c. *History of the Adoption of the 1868 Constitution and the Suffrage Article.*

(1) *Congressional Reconstruction.* Dismayed by President Johnson's refusal to address matters in the Southern states, voters in the Northern states in the 1866 election sent to Congress more than a two-thirds majority of senators and representatives willing to cooperate with the Radical Republicans. In March 1867, legislation was enacted, over the president's vetoes, which divided the former Confederate states—except Tennessee—into military districts to be commanded by major generals. Florida was in the Third Military District commanded by General John Pope. The general was to establish election districts and register voters for election of delegates to a new constitutional convention. All adult males were permitted to vote, except those disqualified for office-holding by the 14th Amendment. The newly elected convention was to write a constitution extending voting rights to all male citizens regardless of race. When it was ratified and the next legislature approved the 14th Amendment, the state could resume its normal relations with the Union.

(2) *Adoption of the 1868 Constitution.* While most were appalled at the new legislation, white Floridians reacted in various ways. Some decided to emigrate, some chose to do nothing, but others tried to make the best of the situation. Nearly all, however, were adamantly opposed to black enfranchisement.

While Ossian B. Hart, a former slave owner and adamant Unionist who favored black enfranchisement, worked with the military authorities to register voters for the upcoming election, political associations began to take shape. Although they were divided as to what course to follow and many were unsure as to whether they would be eligible to vote and hold office, white Floridians began calling themselves Conservatives. Some, such as Governor Walker and David Yulee, a former U.S. Senator and one of only four Floridians incarcerated in 1865 for his role in the rebellion, were anxious to get the state readmitted to the Union so that they could get on with rebuilding and expanding the economy. This goal made some of them willing to compromise with amenable members of the emerging Republican Party.

Composed of Southern Unionists such as Hart, federal office-holders such as Thomas Osborn, and Harrison Reed of the Post Office Department, as well as thousands of newly enfranchised blacks, the developing party was amorphous, tumultuous, and fluid. While identifying with his new law partner, McQueen McIntosh, one of the most conservative men in Florida, Osborn was busily attracting black supporters through a secret society called the Lincoln Brotherhood. He was shortly upstaged in that effort by Daniel Richards of Illinois, a former tax commissioner in Florida, and William U. Saunders, a black from Maryland, who were supported by the Union League, an affiliate of the national Republican Party. They were joined by Liberty Billings of Fernandina, who had been a chaplain in a black regiment, and Charles H. Pearce, who had come to Florida to organize the African Methodist Episcopal Church. This so-called Billings-Richards faction, attracted a large majority of the newly

enfranchised blacks. Its priority was black enfranchisement and white disfranchisement.

Another component of the new party was the Jacksonville Union Republican Club, composed of prominent Unionist businessmen and professionals, some of whom were Floridians while others were "carpetbaggers" from the North. Hart, was one of the native Floridians, while Harrison Reed, who was less committed to black suffrage, was prominent among the "carpetbaggers." There were a few black members such as Jonathan C. Gibbs who had come from New York solely to assist blacks in becoming citizens. Whether or not they favored or opposed black suffrage, most of these men were interested in getting Florida back in the Union so they could proceed with their plans to develop the frontier state. They understood that black suffrage was a condition precedent to that happening. They were the Republicans most willing to compromise with ex-Confederates with similar economic interests.

A communication between David Yulee and Harrison Reed, who had become acquainted through mutual interests in expanding the Florida railroad system, demonstrates this ordering of priorities and casts light on the ultimate adoption of the 1868 Constitution. After a discussion of a possible alliance between some native Floridians— "Men of character and influence altho engaged in rebellion" as one observer put it —Reed asked Yulee to furnish a statement upon which he and his Conservative associates were willing to unite with the Union-Republicans. Yulee's answer was in agreement with the Reconstruction Acts and promised support of any policy which "can best and soonest heal the wounds of the

past." He asked only that a name other than "Radical" or "Republican" be used by the new group.[19]

It almost worked. The Jacksonville Union-Republicans agreed not to use "Radical," but at Ossian Hart's insistence, the group declined to drop the word "Republican" from its name. Thus, the symbolism of a name rather than disagreements over policy ended the fusion efforts between ex-Confederates and moderate Republicans in Jacksonville.[20]

Negotiations of a similar nature in Tallahassee collapsed at about the same time. With views on Reconstruction similar to those of Harrison Reed, Thomas Osborn was working with his law partner, Governor Walker, and Tallahassee *Floridian* editor, Charles E. Dyke, on a mutually suitable plan of cooperation until Walker found out about Osborn's work with the Lincoln Brotherhood. The furious governor wrote Yulee that "I fear there will be no cooperation," and Dyke castigated Osborn for "proposing to us the most conservative sentiments, . . . while deluding the negroes into joining secret leagues. . . ."[21]

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19. Harrison Reed to D. L. Yulee, April 18, 22, 1867, Platform of April 1867, D. L. Yulee to Philip Fraser, May 17, 1867, Yulee Papers, Special Collections, University of Florida Library. See also Canter Brown, *Ossian Bingley Hart* (Baton Rouge, 1997), p. 103.

20. J.C. Greeley to Friend Williams, May 7, 1867, Yulee to Philip Fraser, May 8, 1867, Reed to Yulee, May 20, 1867, Yulee Papers; Brown, *Ossian Bingley Hart*, p. 193.

21. David S. Walker to D. L. Yulee, May 6, 1867, Charles E. Dyke to Yulee, July 22, 1867, Yulee Papers.

No overt alliance was formed between ex-Confederate Conservatives and moderate Republicans, but there would be important collaboration behind the scenes as will be shown. Meanwhile, native white Conservatives, moderate Republicans, and military officials alike denounced Billings, Richards, and Saunders for their demagogic methods. But, that did not stop the Billings-Richards faction from cementing its relationship with the large majority of blacks.

An election was scheduled for mid-November 1867, for voters to decide whether there should be a constitutional convention and, at the same time, to elect delegates to it. When the Republican Party snubbed them in naming a slate of delegates, the Duval County Radicals named a contesting delegation that included Billings. Just weeks before the election, Richards and Saunders moved to Gadsden County and ran as delegates from there. These maneuvers were to have important consequences for the upcoming convention.

Only 14,503 ballots were cast in November, with all but 203 favoring a convention. That was a majority of the 28,003 registered voters. Many of the Conservatives—more than 10,000—had boycotted the election in hopes of defeating the convention. Their efforts failed and at the same time deprived them of opportunity for membership in the convention. General Pope issued an order certifying the election of 46 delegates for a convention to begin at Tallahassee on January 20, 1868. Only two of them were Conservatives. Eighteen of the remaining 44 were black. There were 26 white Republicans, including Southern Unionists as well as federal officials—Freedmen's Bureau agents for example—from the North.[22]

22. Shofner, *Nor Is It Over Yet*, p. 176.

An ecstatic Daniel Richards wrote that "The Radical team has triumphed. Billings, Saunders, and myself have created the Republican Party in Florida and made a convention with two-thirds if not three-fourths of our friends. . . . The convention will be extremely Radical.[23]

The situation was not as clear as Richards saw it. The national Republican Party had already cut off his funding and was channeling money to Florida through Harrison Reed, the friend and business associate of former Confederates David Yulee and Governor Walker. Perhaps even more important, shortly after the election, General John Pope, whose policies had favored the Radicals, was removed from command of the Third Military District and replaced by General George C. Meade, who was more interested in preserving order than in political goals. Colonel John T. Sprague, well-acquainted with Governor Walker and other Floridians since his participation in the Seminole War a quarter century earlier, was Meade's subordinate in Florida.

Convinced that Richards, Billings, Saunders and Charles H. Pearce[24] were ineligible for their seats in the convention on grounds of non-residency, angered by the way General Pope had drawn the election districts, and encouraged by his removal, Conservatives attempted to block the convention. For example, U.S. Marshal Alexander Magruder, a native

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23. Daniel Richards to Elihu B. Washburne, November 19, 1867, Washburne Papers, Library of Congress, as quoted in Shofner, *Nor Is It Over Yet*, p. 176.

24. Pearce had been elected from Leon County where he resided, but had only recently arrived from Canada.

Florida Unionist, complained to his superiors that Florida whites regardless of party would "do anything and accept every thing, except the doctrine of full and complete equality of the negro with the white race."[25] Despite this and other complaints, General Meade declined to intervene.[26]

Meanwhile, the lines were being drawn between opposing groups of Republicans for control of the convention. Richards and Billings rented a house to provide dwellings for needy black delegates as well as to facilitate caucuses and decrease the possibility of wavering members accepting offers from the opposition. Meeting arriving delegates at the railroad station with a carriage and team of mules, Billings and Richards became known as the "Mule Team." Harrison Reed set up his headquarters at the City Hotel, across the street from the capitol, where he made use of the funds he was receiving from the national Republican Party. He was joined there by Edwin M. Randall, the brother of President Johnson's postmaster general, and William H. Gleason, a longtime acquaintance from Wisconsin, with whom he (Reed) and Governor Walker were business associates. Walker and other ex-Confederate Conservatives participated freely in planning sessions with Reed and Gleason.[27]

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25. Alexander Magruder to Attorney General, January 6, 1868, Attorney General's Papers, Record Group 60, National Archives, as quoted in Shofner, *Nor Is It Over Yet*, p. 177.

26. Brown *Ossian Bingley Hart*, p. 207.

27. Shofner, *Nor Is It Over Yet*, p. 178; Brown, *Ossian Bingley Hart*, p. 208.

When the convention first met in the assembly hall of the state capitol, 26 of the 46 delegates named on General Pope's order were present. Charles Pearce was elected temporary chairman and he appointed Saunders as chairman of a committee on permanent organization. All seemed well for the "mule team" until Saunders reported Daniel Richards for permanent chairman. William J. Purman, a Freedmen's Bureau Agent from Jackson County, opposed the motion on grounds that the nominee was not a resident of the county from which he had been elected. The Radicals replied that General Pope's order was the final authority on the seating of delegates. Richards was allowed to take his seat and promptly named 17 committees to work on the constitution, but Purman, C. R. Mobley, L. W. Rowley, and other moderate Republicans used every dilatory means of delaying action, hoping to gain control of the convention as more delegates arrived. The delay concerned Richards who wrote a friend that "All our delegates are poor, . . . all those of easy virtue soon fall prey to these minions of the devil and A. Johnson who have plenty of money." [28]

By January 31, 41 delegates were seated in the convention and the two factions were generally aligned. Richards, Billings, and four other white Radicals were joined by 15 blacks. Three blacks were aligned with 16 white moderate Republicans. In an effort to acquire one more supporter, moderate George J. Alden moved the seating of John W. Butler of Santa Rosa County in place of Conservative

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28. Richards to Washburne, February 2, 1868, Washburne Papers, as quoted in Shofner, *Nor Is It Over Yet*, p. 179.

George W. Walker who had declined to attend. Richards successfully tabled the motion, leaving the Radicals in control.[29]

At that point, the moderate members abandoned the convention and moved to nearby Monticello where Osborn and his colleagues conferred with Reed and Hart, and several prominent Conservatives, including McQueen Mcintosh and Charles Dyke. Their plans were well-known to the military officials. Colonel Sprague, a good friend of Ossian Hart, wrote General Meade that the Billings-Richards faction was so unpopular that nothing they did would be acceptable to the people, including "Southern loyalists." That assessment included Hart, who despite his support for black suffrage, was working with the moderate Republicans and Conservatives because he thought Billings and Richards were too extreme. He believed that a constitution that enfranchised black and disfranchised all those to which section three of the 14th Amendment applied, would not be accepted by white Floridians.[30]

With only 22 delegates present when the convention reconvened on February 4, it was decided that, since only 41 delegates had been seated, they still constituted a quorum. They quickly completed a constitution which provided for equal legislative apportionment based on population, state and local officials to be elected by the people they represented, and disfranchisement of white Floridians

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29. *Journal of the Constitutional Convention of 1868*, pp. 25, 30.

30. Brown, *Ossian Bingley Hart*, p. 211.

prohibited from office-holding by the 14th Amendment. Their suffrage article included no provisions for disfranchising ex-convicts. The document was sent to General Meade in Atlanta, and the convention adjourned until February 15.[31] It was Meade's responsibility according to the Reconstruction Acts to forward the document, with his recommendation, to the Congressional Joint Committee which had to approve it before it could be submitted to the people of Florida for ratification.

Having been joined at Monticello by two delegates—Conservative John Campbell and Republican Washington Rogers—who had not yet attended the convention, the moderates returned to Tallahassee and entered the assembly hall late in the evening of February 10. Charles Hamilton, a former Freedmen's Bureau agent closely associated with Osborn, persuaded two delegates who had previously voted with the Radicals, to get out of bed and join the late night session. Richards, Billings, Saunders, and Pearce were removed from their seats on grounds of non-residency and replaced by Marcellus L. Stearns and J. E. A. Davidson of Gadsden County, Richard Wells of Leon, and Ossian Hart of Duval. Horatio Jenkins, a delegate from Alachua County was named president.[32]

Daniel Richards asked both Colonel Sprague and General Meade to repossess the assembly hall for him, but instead they responded to Governor Walker's request for a guard to

31. U. S. House of Representatives, *Document No. 109*, 40th Cog., 2nd Sess., pp. 6-21.

32. Shofner, *Nor Is It Over Yet*, p. 183.

protect those who had taken possession during the night. With the moderates meeting in the assembly hall, the Radicals holding sessions in black churches or on the public square, and Liberty Billings speaking to large crowds of freedmen, the streets of Tallahassee were quite chaotic during the week following February 10. With Richards bombarding him with messages that a mob had taken over the assembly hall, General Made was pleased to receive a recommendation from Horatio Jenkins that both contending presidents resign so that a new election could be held.

Arriving in Tallahassee on February 17, Meade accepted the resignations of Jenkins and Richards. Colonel Sprague then presided temporarily over a new election. Jenkins was elected president of the convention, this time by a vote of 32 to 14. The four "ineligible" delegates were again ousted and replaced by the same men as before. In this manner, General Meade, primarily interested in preserving order, had legitimized the unusual methods by which the moderate Republicans had obtained control of the convention.

(3) *Dilution of Black Votes.* During the next few days, the moderates, frequently consulting with Governor Walker and Charles Dyke—both of whom were in close contact with David Yulee—drafted a constitution which they hoped would meet the requirements of the Joint Committee while appealing to a majority of the ex-Confederate Floridians. They had considerable leeway. After rejecting President Johnson's accomplishments between 1865 and 1867, Congress passed the Reconstruction Acts which reimposed military authority in the state. But, the provisions of the laws were quite limited. They specifically required only a

constitution that guaranteed black suffrage. That limited mandate left many of the provisions of the new constitution to be worked out by those on the scene in Florida, subject only to the review of the Joint Committee in Washington.

The Billings-Richards constitution had enfranchised blacks while denying suffrage to as many whites as possible without regard to future consequences. While the moderate Republicans held various views about black suffrage, they realized that its guarantee in the new constitution was essential to Florida's readmission to the Union. But, they also realized that a govermnent based on black suffrage and opposed by the majority of white ex-Confederates would have little chance of surviving. Furthermore, many of them had strong economic interests coinciding with those of such Conservative leaders as Governor Walker, Yulee, Dyke, and others. Wanting a constitution that would meet Congressional requirements while still being acceptable to the native white Conservatives, the moderate Republicans made concessions which intentionally discriminated against the newly enfranchised blacks and severely diluted their votes.

Rather than equal numerical representation, legislative apportionment was based on geography—each county would have one representative in the assembly and no county would have more than four.[33] With most of the blacks concentrated in eight agricultural counties of Middle Florida, plus Duval and Nassau on the Atlantic Coast, that meant a disproportionate representation in favor of the 29 sparsely populated and predominantly white counties. Further, the

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33. *Constitution of 1868*, Article I, section, 15.

document called for the governor to appoint his cabinet officers, all court justices, and all local officials except constables.[34] On February 16, Reed wrote Yulee that "I think the destructors have effectually been overthrown and the state saved to 'law and order . . . the Judiciary and State officers will be appointed & the apportionment will prevent a negro legislature.[35]

(4) *The Suffrage Article*. The suffrage article was the most controversial of all and was adopted only after extensive parliamentary maneuvering. On February 20, an article providing the "Right of Suffrage" was read and ordered printed. Three sections are pertinent. *Section Three* provided in part "at the first election for State officers, and for the period of one year from the ratification of this Constitution, the registration list prepared by the authority of Congress of the United States shall be used, . . ." Since numerous native white men had not registered in 1867 they would have been ineligible to vote during the first elections. *Section Four* read: "All electors shall in all cases, except for treason, felony, or breach of the peace, be free from arrest on days of election, during their attendance at said election, going to and returning therefrom." *Section Five* provided that "No idiot or insane person, or person convicted of infamous crime, shall be entitled to the privileges of an elector, except when such convicted person shall have been pardoned in the manner prescribed in this Constitution."

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34. U.S. House, *Miscellaneous Document No. 109*, pp. 25-44.

35. Harrison Reed to D. L. Yulee, February 16, 1868, Yulee Papers.

The article was signed by two Radicals—J. H. Goss and Jonathan C. Gibbs—and three moderates, C. R. Mobley, Thomas W. Osborn, and George R. Alden.[36]

The convention proceeded to wind up its affairs with a series of administrative ordinances. Then, on February 24, just before adjournment, W. K. Cessna, a moderate, moved that the vote adopting the "franchise article" be reconsidered. L. W. Rowley, another moderate, offered a substitute, the pertinent parts of which were sections one, two and four. *Section One* provided that "Every male citizen of the United States of the age of twenty one years,. . . shall be entitled to vote. . . ." *Section Two*, after disqualifying insane persons for voting, then added, "nor shall any person convicted of *felony* be qualified to vote at any election unless restored to civil rights." *Section Four* provided for the exclusion from the right of suffrage of "all persons convicted of bribery, peijury, larceny, or of infamous crime. . . ."[37]

The substitute was adopted by a vote of 27 to 15. The majority included all of the moderates and John L. Campbell, the only Conservative, who had begun his convention activities at Monticello. All of the 15 in opposition were Radicals, including Gibbs and Goss who had been willing to accept the version that had been ordered printed on February 20, but disagreed with the substitute which extended suffrage to all adult males and provided for disfranchisement of felons.

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36. *Journal of the Constitutional Convention of 1868*, pp. 89-90.

37. *Ibid.*, p. 124-126; Tallahassee *Weekly Floridian*, February 25, 1868.

The Radical constitution, which the moderates had replaced, had included no disfranchisement for crime in its suffrage article. The ambiguous version of the article written by the Goss committee, with two Radicals and three moderate members, did not satisfy the Conservative leaders who were in almost constant communication with the moderate delegates during the closing days of the convention. The version introduced by Cessna and Rowley, and which was finally adopted, provided for universal manhood suffrage in that no ex-Confederates were disfranchised. At the same time, it was more proscriptive than the provisions of Florida's three earlier constitutions with regard to ex-convicts. These last minute changes reflected the new approach to crime and punishment of the 1865 legislature, and was consistent with the other provisions of the 1868 Constitution that diluted the effect of the black enfranchisement mandated by Congress.

Felony disfranchisement was a way of reducing the effect of the despised black suffrage that Conservatives knew they had no alternative but to accept. Larceny, which included the new category added by the 1865 legislature, was added to the earlier lists of crimes for which convicts could be disfranchised because the Conservatives agreed with Anderson Peeler's admonition about its increase resulting from the abolition of slavery.

On February 24, the same day that the convention reconsidered the suffrage article, Governor Walker wrote Yulee that "Col. Hart showed me an ordinance this moment allowing all white people to vote the same as negroes and asked me if I thought the white people would vote if they

had the chance." He added that, "the constitution, I learn is a good one.[38]

In the *Floridian* of February 25, Dyke printed both versions of the suffrage article. "It is printed in the article as originally reported and as adopted yesterday. Considering that the convention is working under the Reconstruction Acts. ... the suffrage provisions is as liberal as could be expected."[39] The moderate version of the constitution, with the substitute suffrage article, was approved on February 25 by a vote of 28-16, and sent to General Meade. He forwarded both versions to the Joint Committee, but recommended the moderate one because it was signed by a majority of the delegates and the Radical one was not. Both sides sent representatives to Washington to argue their cases, but Congress ultimately accepted the moderate version and returned it to Florida to be submitted to the people. An election was scheduled for mid-May at which a governor would also be chosen.

The moderates nominated Harrison Reed for governor and campaigned for ratification of the constitution. The Radicals, after considerable confusion, named Liberty Billings as their candidate and opposed the constitution. Billings was soon arrested by Colonel Sprague for making "incendiary" speeches and held at Fort Marion in St. Augustine until after the election. He was hurriedly replaced

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38. D. S. Walker to D. L. Yulee, February 24, 1868, Yulee Papers.

39. Tallahassee *Weekly Floridian*, February 25, 1868.

by Samuel Walker of Tallahassee. Meanwhile, William Saunders, Jonathan Gibbs, and several others deserted to the moderates.

Many Conservatives were still unwilling, despite the many concessions, to vote for *any* Republican constitution. But, because of the split in Republican ranks some leaders chose to place a candidate in the race. Editor Dyke was furious, "I labored night and day to produce the split in the convention," he wrote, . . . we ought to feel grateful to Reed and Company" for "a constitution so much more liberal than was expected." He was afraid a Conservative ticket might reunite the Republicans.[40] He need not have worried. With George W. Scott as their nominee for governor, the Conservatives ran a lackluster campaign against the constitution.

The May election returns favored the constitution by 14,520 to 9,491. Reed received 14,170 votes to Scott's 7,852 with 2,262 for Walker. The legislature elected Thomas W. Osborn to the long term in the U.S. Senate while William H. Gleason became lieutenant governor on the ticket with Reed. Hart, who had assisted not only by working with the Conservatives but also by cooperating with Colonel Sprague, was appointed to the Supreme Court. He would succeed Reed as governor in 1872.[41]

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40. As quoted in Shofner, *Nor Is It Over Yet*, p. 189.

41. *Ibid.*, pp. 192-193.

d. Florida's Use of Criminal Law to Target Blacks and the Effect of Criminal Disfranchisement on Blacks.

The 1865 Constitution had added "infamous crimes" to the list of offenses for which criminals could be disfranchised and the Black Code enacted by the 1865-1866 legislature added larceny and vagrancy to a lengthy list of crimes for which punishment was provided. Although the Congressional Reconstruction Acts of 1867 overturned the 1865 Constitution, the 1868 document included disfranchisement for "infamous crimes" and the 1868 legislature included larceny and vagrancy in a lengthy list of "infamous crimes."

(1) *The 1868 Criminal Statutes.* The 1868 statutes defined *felony*, the conviction for which led to disfranchisement, as "any crime punishable by death or imprisonment in the State penitentiary."[42] "An act to provide for the Punishment of Crime, . . . enumerated a long list of such crimes. One of them was larceny involving more than 20 dollars in value, the punishment for which was imprisonment in the state prison or the county jail. Larceny involving 20 dollars or less in value was punishable by confinement in the county jail, but convictions for second offenses, or for two separate larcenies at the same time, were subject to "punishment by imprisonment in the State penitentiary not exceeding twenty years, or in the county jail not exceeding one year."[43]

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42. *Laws of Florida*, 1868, p. 12.

43. *Laws of Florida*, 1868, pp. 72-73.

Conviction for misdemeanors also led to disfranchisement if they were "infamous crimes." Those crimes were "offenses against chastity, morality, and decency," such as adultery, polygamy, keeping houses of ill fame, crimes against nature, and 25 others. Vagrancy was included in this section of the statute. "Rogues and vagabonds, idle and dissolute persons.. . , stubborn children, runaways, . . . and all other idle and disorderly persons," are only examples of a lengthy list of persons whose conduct subjected them to punishment as vagrants by confinement in the county jail for terms not exceeding six months.[44]

(2) *The End of Reconstruction in 1877.* This criminal statute was still in effect when Florida's last Republican governor for nearly a century was defeated by Conservative-Democrat George F. Drew in 1876. With the power to appoint local officials in their hands, Democrats accelerated their efforts to eliminate the Republican Party and the still unwelcome black suffrage from Florida. In a report prepared by ex-Senator Thomas W. Osborn on the 1880 election, the Republican state executive committee described how that was being done and how the disfranchisement provisions of the 1868 Constitution were being used.[45]

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44. *Laws of Florida*, 1868 pp. 96-100.

45. *Report of the Republican State Executive Committee of Florida to the Republicans of the State, Upon the Election held November 1, 1880,* (Washington, National Republican Publishing Company, 1881).

Osborn, who had been one of the authors of the suffrage article of the 1868 Constitution, explained that the Bourbon Democrats were using the provision for disfranchisement of those convicted of "infamous crimes" without regard to the "grade of the offense" to reduce the number of black voters. He said that "Hundreds of men in the State have been convicted of offenses for which a fine of fifty cents or a dollar or confinement for three days or a week was imposed, and in consequence of which they are disfranchised for life.[46] People, he added, were being disfranchised for convictions of petty crimes in the justice of peace courts often on "purely trumped-up" charges.[47]

This is what Florida Convict Camp Captain John C. Powell was referring to when he wrote in 1891 that "In the early days it was possible to send a negro to prison on almost any pretext, but difficult to get a white man there . . ." with the result that in the Florida prison "the proportion of whites to blacks was as one to twenty."[48]

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46. *Ibid.*, p. 18.

47. *Ibid.*, p. 19.

48. John C. Powell, *The American Siberia, or, Fourteen Years' Experience in a Southern Convict Camp* (Gainesville, 1976), p. 332.

(3) *The Penal System and Forced Labor.*

(a) *Convict Leasing.* In his "Shackles in the Sunshine" in 1973, James Bacchus wrote that "The Florida Penal System has long been a sanctuary for cultural and institutional racism. ... State convicts—*almost all of whom were Negroes* (italics added) until World War I—were delivered into ersatz slavery as contract labor for turpentine camps, lumber mills, railroad crews, and phosphate mines."[49]

As it developed in the years between 1868 and the 1920s, convict leasing became a heinous institution that subjected convicts to the worst kinds of abuse and all-too-frequent death. The excesses of the convict camps were overlooked because of the system's profitability to the state and the entrepreneurs who operated the camps. Only when exposure of its brutality in the 1920s threatened to damage the image of the Sunshine State was action taken. It is worth noting, however, that the overwhelming majority of those who died in the camps were blacks, while the press only took notice of individual cases when a white man was the victim.

It began with the Republicans, but it was the Bourbon Democrats who turned the convicts over to the lessees to do with them practically as they wished. In his address to the 1868 legislature, Governor Reed said that holding prisoners in jail was bankrupting the cash-strapped state and that pardoning them was not a suitable solution. He thought that

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49. James Bacchus, "Shackles in the Sunshine," Orlando *Sentinel Star Sunday Magazine*, June 17, 1973.

"A penitentiary. . . instead of being an expense to the government,. . . can readily maintain itself, and be made a source of income."[50] With the acquisition of the abandoned U. S. arsenal at Chattahoochee, legislation in 1868 as revised in 1871 established a prison and Malachi Martin was appointed warden.[51] The Chattahoochee facility was in disrepair and no funds were appropriated for its rehabilitation, but Martin used it to house prisoners while leasing them himself for use on his farm. During the remaining six years of Republican administration he and other lessees worked the prisoners under conditions which were far from pleasant, but as warden, Martin at least remained responsible for their care.

After George Drew, a Bourbon Democrat, became governor in 1877, the legislature abolished the office of warden and turned the prison over to the state adjutant general. That official could then release custody and control of prisoners, for up to four years, to lessees who put them to work at places usually quite distant from the prison. "Such contractors . . . shall have full and complete power to control and discipline such prisoners and to maintain order among and enforce obedience from the same, and to . . . prevent escapes and compel performance of labor . . . ," according to the statute.[52] The law prohibited "cruel or inhuman

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50. Florida, *Assembly Journal*, 1868, p. 69.

51. *Laws of Florida*, 1871, 17-23.

52. *Laws of Florida*, 1877, p. 93; N. Gordon Carper, "The Convict Lease System in Florida, 1866-1923" (Ph. D. Dissertation, Florida State University, 1964), p. 42.

punishment" or "punishment injurious to mind or body," but those provisions were ignored during the following 45 years.[53] The same legislature converted the state prison into an asylum for the insane.[54] The 1879 legislature empowered "the Several Counties of this State to Hire Out the Convicts Sentenced to Confinement in the County Jail.[55]

Pursuant to those statutes, the Bourbon Democrats turned convict leasing into a profit-making enterprise for the state, a source of cheap labor for railroad builders, turpentine operators, and phosphate mine owners, and an institution in which life was brutish, miserable, and very often short for prisoners.

It also had a creative aspect because, as blacks were relegated to second class citizenship, they were increasingly vulnerable to arbitrary arrest for crimes both alleged and real. Sentencing was done by courts where officials were still very often influenced by the customary attitudes about blacks that the 1865 legislature had demonstrated and the ensuing years had done nothing to abate. In his *American Siberia*, John C. Powell, who spent 14 years as a captain in Florida convict camps, estimated that *95 percent* of the convicts in the 1870s and 1880s were black, although he thought the ratio had declined by 1891.[56]

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53. *Laws of Florida*, 1877, p. 93.

54. *Laws of Florida*, 1877, p. 95.

55. *Laws of Florida*, 1879, pp. 77-78.

56. Powell, *American Siberia*, p. 332.

As late as 1906, however, J. S. Blitch, who subsequently became warden of Florida's "model prison," told an audience that "ninety percent of our Florida convicts are negroes." He added philosophically that "the inaptitude of the negro to acquire a trade or become a skilled artisan was long ago demonstrated in my State at least."[57]

Although he sometimes defended the convict lease, Captain Powell matter-of-factly depicted a vicious system in which brutal guards consistently drove prisoners beyond their endurance and then beat them when they were unable to continue. Beatings with a leather whip attached to a wooden handle were administered for almost every imaginable infraction of the rules, but the most common was failure to work fast enough. Men—and women in the same camps, using the same facilities—already exhausted from over-work were subjected to beatings which left them even more exhausted. When they became ill they frequently died from lack of treatment.[58] Critics of the system repeatedly observed that it was less humane than slavery where the owner had at least had a vested interest in treating his property well. The convict lessee had no such interest. Prisoners who died could easily be replaced by others, as ex-Senator Thomas Osborn explained in 1880.[59]

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57. As quoted in Bacchus, "Shackles in the Sunshine," June 17, 1973.

58. Powell, *American Siberia, passim.*

59. *Report of the Republican State Executive Committee of Florida to the Republicans of the State, upon the Election Held November 2, 1880*, pp. 18-19.

By the early 1880s, there was criticism. The Jacksonville *Florida Times Union* declared that "the treatment of our prisoners is such as public opinion would not tolerate for a week if it were exposed."[60] What went on in the convict camps was in isolated places, far away from most of the population. And those involved were mostly black.

One of the people who did notice was Reverend Robert F. Rogers, a Baptist minister from Suwannee County. There, not far from Live Oak, was the turpentine works of C. K. Dutton, a New York capitalist, in whose camps excessive cruelty was becoming notorious in that county. A delegate to the Constitutional Convention of 1885, Rogers proposed that the state end the leasing system and operate its own prison and farm.[61] He was rebutted by proponents of the system on grounds of economy, but the 1885 Constitution did provide for a state prison to be established "as may be prescribed by law."[62]

An enabling act was passed in 1889, but by that time phosphate had been discovered in the Peace River Valley and prospects of profits for the state coffers were too great. Convicts continued to be leased with the phosphate companies now competing for their services. By that time lessees of the state convicts were sub-leasing them to others. The system had become a business enterprise.

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60. Jacksonville *Florida Times Union*, July 14, 1883.

61. Edwin C. Williamson, *Florida Politics in the Gilded Age* (Gainesville, 1976), p. 136.

62. *Constitution of 1885*, Article XIII, section two.

From the late 1890s there was almost continuous criticism of the leasing system and the atrocities associated with it. All but four of the southern states had ended their lease systems, and the *Tampa Tribune* was only the most vocal of those demanding that Florida follow suit. Along with other advocates of "good roads," it was calling for convicts to be put to work on a state road system. The controversy came up in every legislative session after 1907.

In 1913, the legislature established a state prison farm that subsequently became known as Raiford Prison. But, only women and disabled men were to be housed there. Able-bodied male, or class one, prisoners continued to be leased. Then, after 1915, leasing to private firms was limited to *black males only*. In 1919, the state leasing system was abolished and the convicts would henceforth be worked on the public roads.[63] County convicts continued to be leased to turpentine and lumber manufacturers.

By 1921, J. S. Blitch, warden of the state prison farm, was winning praise from the National Prison Association for the "model prison" that prison officials from all over the country were coming to observe. One Northern visitor praised the way the farm was run, saying that it reminded him of "an old semi-feudal plantation." Whether he realized it or not, the Northerner had made a good analogy. Blitch's view of blacks was not much different from those espoused by Governor David Walker and his associates in 1865. In language reminiscent of Anderson Peeler's report to the 1865

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63. *Laws of Florida*, 1913. p. 419-425, 1915, pp. 255-257.

legislature, he explained that "We of the South do not blame the Negro for crimes which we understand are natural to his race. . . ."[64]

While the state farm was quite progressive for the time, things had not changed in the convict camps. Balls and chains, "sweat boxes," and flogging, were still taking toll of hapless prisoners. In 1923, the murder of Martin Tabert, a young South Dakota man who had made the mistake of vacationing in Florida, began to make headlines. The *New York World* revealed how he had been arrested for vagrancy by Leon County Sheriff J. R. (Jim Bob) Jones. Jones was filling a quota of laborers for the Putnam Lumber Company. At the firm's camp in Dixie County, Tabert was beaten to death by a cruel boss who then disguised the cause. Another convict wrote Tabert's family in South Dakota and eventually the truth came out. The resulting scandal brought the leasing of county convicts to an end in 1923. But, as James Bacchus points out in his "Shackles in the Sunshine," Tabert was white. The only individual deaths which became public issues involved whites: in Orange County in 1906, the Tabert case in 1923, and two in the state road camps in the early 1930s. Individual black deaths from the same causes went largely unnoticed.

The official end of convict leasing really changed little. Bacchus shows how the road gangs were treated just as badly as the convicts who had previously been leased to private firms, and how blacks continued to receive by far the worst treatment. According to him, between 1923 and 1936,

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64. Bacchus, "Shackles in the Sunshine."

604 prisoners were paroled and only 19 percent of them were black. Of the 1,801 pardons between 1926 and 1936, 660 of them went to blacks. And, throughout those years blacks constituted a large majority of the total prison population.[65]

(b) *Peonage*. Closely paralleling, often overlapping, and sometimes almost merging with convict leasing, was the pervasive system of debt peonage. The holding of a person to forced labor for payment of debt, a violation of U.S. statutes, was an outgrowth of the disruption of labor resulting from emancipation of the slaves. First developed on the farms where tenants rented land, borrowed to buy provisions to make a crop, failed to "pay out" at the end of the year, and wound up in perpetual debt, it soon spread to other occupations.

Although some whites were affected as in the case of convict leasing, blacks comprised the large majority of those caught up in debt peonage. The racial conditions of post-Civil War Florida shaped and perpetuated the peonage system. Believing that blacks were their natural labor supply and that they would not work without coercion, white employers and local officials, with few exceptions, treated blacks as forced labor. Those officials had little reservation about arresting blacks with or often without cause. When they were unable to pay their fines, those arrested could then be sold to the highest bidder to work off the costs as provided by legislation of 1865 and 1891.[66] At this point there was little difference between debt peonage and convict leasing.

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65. *Ibid.*

66. *Laws of Florida*, 1865, p. 22, and 1891, p. 55.

But, often, there was no official act involved, and those needing laborers simply handled the matter informally. Once the worker had incurred a debt, which could easily happen in many ways, he was not permitted to leave the employment until it was paid. Paying off a debt was an elusive undertaking, especially in the turpentine and lumber camps that were usually far away from the towns. If the employer provided transportation to the camp, the worker was charged for it. Thus, he was immediately in debt. He was then obliged to buy supplies from the company commissary which increased the indebtedness. It was quite common for a worker to be told on payday that his wages were being applied to his debt and that the remaining unpaid portion would be carried over. If he tried to escape he was brought back by whatever force was required.

The informal arrangement was given the force of law in 1891 by a statute which provided that anyone who accepted "money or other thing of value" on a promise to perform labor and then failed to do so was guilty of fraud. This legislation was refined in 1907, 1913, and 1919. By the latter date, the same year that state convict leasing ended, the law provided that in prosecutions resulting from such an act the failure to perform or to pay up "shall be prima facie evidence of the intent to injure and defraud."[67] Under this handy statute, turpentine operators and others requiring laborers could recruit individuals, furnish them transportation to the work site, assess an advance charge for the service, and subsequently hold them until the debt was paid. The company

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67. *Laws of Florida*, 1891, pp. 57-58, 1917, p. 182, 1913, p. 417, 1919.

commissaries in the isolated areas usually kept that from happening.

The Martin Tabert case and the end of county convict leasing had little effect on the peonage situation. Only because of the persistence of U.S. Attorney Fred Cubberly and Judge William B. Sheppard of the Northern District of Florida did it become public knowledge that it was peonage as usual in the state after 1923. They found and pursued violators of the U. S. peonage law in several northern Florida counties and even obtained a few convictions. But, as late as 1937, the man—T. W. Higgenbotham—who had beaten Martin Tabert to death, was still working in a camp at Shamrock in Dixie County where several hundred workers were still being kept inside a fence with guarded gates. Just a few miles west of Jacksonville in Baker County, according to one investigator, "the entire Negro population of MacClenny . . . are held in . . . virtual peonage and slavery."[68]

Even the United States Sugar Corporation was prosecuted for recruiting laborers from Tennessee and holding them against their will in the marshlands near Lake Okeechobee with the aid of deputy sheriffs who kept watch on the few roads leading from the fields. The charges were dismissed on a technicality at Tampa in 1943.[69]

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68. Aron S. Gilmartin to Homer T. Cummings, November 13, 1936, as quoted in Jerrell H. Shofner, "Postscript to the Martin Tabert Case: Peonage as Usual in the Florida Turpentine Camps," *Florida Historical Quarterly*, October, 1981, p. 170.

69. Jerrell H. Shofner, "The Legacy of Racial Slavery: Free Enterprise and Forced Labor in Florida in the 1940s," *Journal of Southern History*, August, 1981, p. 416.

e. *Continued Effort to Restrict Black Voting after 1868 and in the post-Reconstruction Period.*

(1) *The Reconstruction Years.* As time passed after 1877, the eight years during which Republicans were governors of Florida came to be referred to as "Radical Reconstruction." To white ex-Confederate Floridians, those governors—Reed, Hart, and Marcellus L. Stearns—symbolized their recent defeat—"The Lost Cause"—and the recent addition to the electorate—"Negro Rule." Those terms made excellent campaign rhetoric for the Bourbon Democrats who gained control of the state in 1877, but in actual practice Reconstruction was not very "Radical" and "Negroes" certainly never "Ruled." Jonathan C. Gibbs, a Princeton-educated minister, was the only black who advanced to high office in the state. He served as secretary of state and then superintendent of public instruction before his death in 1874. Josiah Walls of Gainesville, a U.S. army veteran, was the only black elected to Congress. Several blacks served creditably in the state house and senate, but they never came close to controlling either of those bodies. Reed vetoed a civil rights bill in 1868 and another was not enacted until 1873 when Hart was governor. Hart was more sympathetic to the blacks than Reed, but his illness and eventual death led to his succession by Marcellus L. Stearns who had little regard for the blacks nor they for him. The oft-repeated slogan, "the bottom rail on top" was never true in Florida.

Nor were the Conservatives satisfied with the concessions from the moderate Republicans in 1868. While Hart, Reed, Osborn and others had hoped they were writing a constitution under which all Floridians would be willing

to live, the Conservatives regarded those concessions as a departure point from which they could continue to work toward restoring their state to a racial arrangement which they considered proper.

No sooner was the constitution ratified than the Conservatives began a venomous attack on the Republican administration. With an empty treasury, a new government to build, and a hostile population to whom he symbolized "The Lost Cause" and "Negro Rule," Reed had an overwhelming task. He was criticized, satirized, and resisted at every turn. His appointment to his cabinet of two prominent Conservatives as comptroller and attorney general did little to lessen the attack.

The political assault was accompanied by an outbreak of violence ranging from assassinations of prominent Republicans such as John Krimminger, to night-riding vigilantes threatening, beating, and finally murdering white Republicans and blacks who resisted in Alachua, Columbia and other counties. The so-called Jackson County War in 1869-1870 took the lives of an estimated 160 people and eliminated every Republican in the county. That some of the regulator groups called themselves Young Men's Democratic Clubs was indicative of their purposes.[70]

Realizing that they could not police polling places if they were dispersed throughout the counties, election officials consolidated them in the county seats. But, with the resulting large crowds, vigilantes were able to disrupt the elections

70. U. S. House of Representatives, *Report No. 22*, part 13, *passim*.

anyway. Violence and intimidation at the polling places in 1870 enabled the Conservatives to increase their membership in both legislative bodies to near equality with the Republicans.

Violence was accompanied by economic pressure. Landowners in some counties rented land first to those who voted Conservative, or Democrat, second to those who did not vote at all, and third to those who voted Republican. David Yulee's Florida Railroad distributed numbered ballots and told the recipients that those who did not cast them need not return to work after the election.

The violence, along with comparable activity in other Southern states, caused Congress to pass the Enforcement Acts—popularly known as the Ku Klux Klan Acts—by which the president was empowered to declare martial law in counties where civil officials could not maintain order. President Ulysses Grant used that power in numerous cases in Florida, and a few convictions resulted. The politically related violence abated by late 1871, but was not eliminated during the Reconstruction years. Paradoxically, Reed received much of the blame for the disorder during this time.

Making matters worse, Senator Osborn was soon heading a Republican faction that tried to wrest control of the state from the embattled governor. Black leaders were caught between them, using their votes to their advantage when possible.

The result was eight years of chaotic government during which Conservatives—soon to be Conservative-Democrats, and, finally, Democrats—had only to use what the Republicans said about each other in their political campaigns. By 1872 Conservative-Democratic representation in the legislature was nearly equal to that of the Republicans. In 1874, they elected Democrat Charles W. Jones to the U.S. Senate. By 1875, they claimed a small majority in both legislative bodies, albeit by virtue of the midnight murder of Republican Senator E. G. Johnson in Columbia County. Then, in the celebrated 1876 election, Florida's four electoral votes were given to Republican Rutherford B. Hayes while Democrat George F. Drew became governor.

This "Compromise of 1877" facilitated "The Restoration of Home Rule" in the South. During negotiations over the compromise, Hayes' spokesmen had agreed to remove the remaining U.S. military forces from the South. Hayes complied with the agreement in April 1877. The U.S. government thus abandoned its effort to assure a place in Southern society for the freedmen. No U.S. soldiers came into the South because of racial matters again until President Eisenhower sent them to Little Rock, Arkansas, in 1957.

(2) *Constitution of 1885.* By the early 1880s, the Republican party had declined to minority status. An attempt to coalesce with an Independent Party, composed of dissident Democrats, failed in 1884. With the decline of the Republican Party and decreasing likelihood of a return to "Radical Reconstruction," Florida voters approved a constitutional convention for 1885. Only seven blacks were among the delegates elected.

Without much opposition, the convention reduced the powers of the governor, making nearly all local officials elective. The exception was the continued appointment of county commissioners, a concession to white Democrats in the Black Belt counties. The lieutenant governor was eliminated and the governor could serve only one term. Not only that, but he would share executive power with an elective cabinet. The "Bourbon Democrats" considered this decentralization safe because of the declining strength of the Republican Party. Representation of the black majority counties was further reduced by requiring a maximum of three legislative members from each county while all counties continued to have at least one.

The suffrage article (Article VI) continued the disfranchisement of "any person convicted of felony by a court of record. . . ."[71] The addition of the phrase "by a court of record" apparently resulted from the creation of a new level of jurisdiction between that of the County Court and the Circuit Court. The judicial article provided that "There shall be established in the county of Escambia, and . . . such other counties as the Legislature may deem expedient, a County Criminal Court of Record, . . ." The new court was to have jurisdiction "of all criminal cases not capital which shall arise in said counties respectively." Although existing County Courts were already "courts of record,"[72] unlike them the new County Criminal Court of Record was empowered to try felony cases, the punishment for which was confinement in the state penitentiary.[73]

71. *Constitution of 1885*, Article VI, section four.

72. *Laws of Florida*, 1868, p. 12.

73. *Constitution of 1885*, Article V, sections 24 and 25.

The article also continued the disfranchisement of those convicted of "bribery, perjury, larceny, or of infumous crime."[74]

But, there was an important addition. Section eight provided that "The legislature shall have power to make the payment of the capitation tax a prerequisite for voting, and all such taxes received shall go into the school fund."[75] Although some of its proponents insisted that the latter was a school revenue measure, the leading authority on this period of Florida history described that argument as "an example of the subterfuge of the Democrats." He concluded that the new constitution "could well be considered a white supremacy document."[76] It was ratified in November 1886 by a vote of 31,803 to 21,243.

The 1887 legislature quickly addressed the two criminal proscriptions of the suffrage article. Chapter 3704, entitled "An Act to Provide for the Registration of Legally Qualified Voters in the Several Counties of the State, . . ." provided for, among other things, the disfranchisement of "Persons who may have been convicted of felony by any court of record," and "Persons who may have been convicted of bribery, perjury or of larceny or of infamous crime, . . ." Additionally, Chapter 3705, "An Act in Pursuance of Section 5, Article VI, declared that "all persons convicted of bribery,

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74. *Ibid.*, Article VI, section five.

75. *Ibid.*, Article VI.

76. Edwin C. Williamson, *Florida Politics in the The Gilded Age*, (Gainesville, 1976), p. 142.

larceny, perjury, or infamous crimes,. . ." were excluded "from the right of suffrage; . . . ."[77]

(3) *The Poll Tax and Eight-Ballot Box Laws*. The 1889 legislature enacted a law requiring a one dollar poll tax, the receipt for which was required to be presented to the supervisor of elections before a potential voter could be registered. Defenders of the law still insisted that it was intended to finance education. But, their argument was undercut by another law requiring separate ballot boxes for each office, making it difficult for those who could not read to place their ballots in the proper box so that they might be counted.[78] The effect was decisive. In the 1888 election, before the poll tax was enacted, V. J. Shipman, the Republican gubernatorial candidate, lost to Democrat Francis P. Fleming by a vote of 26,845 to 40,255. There was no gubernatorial election in 1890, but the Republican candidate that year for comptroller, a statewide office, received fewer than 5,000 votes. There was no Republican candidate for governor in 1892. Florida had joined the "Solid Democratic South."

(4) *The Democratic "White Primary."* Some counties began nominating candidates through primary elections in the early 1890s. Then, the state Democratic convention, meeting at Jacksonville in 1900, adopted a party rule that only whites could be members of the Democratic Party. The 1901 legislature, in turn, enacted a direct primary law, providing that the political parties could select their

77. *Laws of Florida*, 1887, pp. 52, 66.

78. *Laws of Florida*, 1889, pp. 13-14, 102; Williamson, *The Gilded Age*, pp. 159-160.

candidates through primary elections.[79] The primary was made mandatory in 1913.[80] Since Florida had become a one-party state, the only county, state, and national election which mattered were the Democratic white primaries.

The Democrats were still taking no chances. The 1901 statute also provided that no person could participate in any primary election who had not "paid his poll tax legally due, not less than ten days before such primary election. . . ."[81] That was changed in 1913—and amended in 1915—so that no one could vote in an election who had not paid "on or before the second Saturday in the month preceding the day of such election his poll taxes for two years next preceding the year in which such primary election shall be held."[82]

In addition to the barriers of the white primary and the poll tax, the white man's party still had the provisions of the 1868 and 1885 Constitutions which provided for the disfranchisement of felons as well as those convicted of bribery, perjury, larceny, or infamous crime.

(5) *The Jim Crow System.* The legislation which eliminated blacks from meaningful voting were part of the infamous Jim Crow system which legally separated blacks and whites. After the 1896 *Plessy v. Ferguson* "separate but

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79. *Laws of Florida*, 1901, p. 160.

80. *Laws of Florida*, 1913, p. 242.

81. *Laws of Florida*, 2901, p. 161.

82. *Laws of Florida*, 1915, p. 152.

equal" decision, Florida—and other Southern states—enacted legislation requiring the separation of the black and white races. Segregation had been customary in most circumstances all along, but the 1896 Supreme Court decision led to statutes that enforced custom. By 1915, Florida had enacted legislation requiring separate facilities for blacks and whites, including ticket counters in railroad terminals, seating in public transportation, schools, and even chain gangs, where it was illegal to chain blacks and whites together. Floridians thereafter lived in a society where longstanding custom, reinforced by a legal code, not only permitted but compelled a situation in which blacks and whites went about their lives without ever encountering each other except when blacks were employed by whites. The only other exception was when white convict camp bosses or white prison officials were in charge of black prisoners.

4. *Data and Other Information Considered in Forming Opinions.*

In forming my opinions, I have considered the following materials:

Documents

U.S., Congress, *Congressional Globe*, Senate, June 17, 1868.

U.S., House of Representatives, *Miscellaneous Document No. 109*, 40th Cong., 2d Sess.

_____ *Miscellaneous Document No. 114*, 40th Cong., 2d Sess.

_____ *Report No. 22*, part 13.

Florida, Constitutions of 1865, 1868, and 1885.

_____, Journals of the Constitutional Conventions of 1865, 1868, and 1885.

_____, House and Senate Journals, 1865-1868.

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Correspondence of Individuals

David L. Yulee Papers, Special Collections, University of Florida Library.

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Savannah (Georgia) *Republican*, 1867-1868.

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Tallahassee *Weekly Floridian*, 1865-1883.

Personal Publications Used

Nor Is It Over Yet: Florida in the Era of Reconstruction, 1863-1877. Gainesville, 1974.

"Custom, Law, and History: The Enduring Influence of the Florida 'Black Code'," *Florida Historical Quarterly*, January, 1977. Reprinted in all editions of Leonard Dinnerstein and Kenneth T. Jackson, editors, *American Vistas*. Oxford University Press.

"The Legacy of Racial Slavery: Free Enterprise and Forced Labor in Florida in the 1940s," *Journal of Southern History*, August, 1981

"Mary Grace Quakenbos: A Visitor Florida Did Not Want," *Florida Historical Quarterly* January, 1980.

"Postscript to the Martin Tabert Case," *Florida Historical Quarterly*, October, 1981.

General Knowledge

In addition to specific use of the above listed books and articles which I have written, I have also drawn on my more general knowledge acquired from over 30 years of studying, writing, and teaching Florida History and the History of the U.S. Civil War and Reconstruction. I taught Florida History at the University of Florida, Florida State University, and the University of Ceniral Florida from 1967 to 1997, Civil War and Reconstruction at Florida State University and the University of Central Florida from 1970 to 1995. I also taught Southern History at the University of Central Florida from 1972 until about 1985.

5. *Compensation.*

I am being compensated $100 per hour for my work in connection with drafting this report and for the time I spend testifying and preparing for testimony at trial and in pre-trial depositions.

6. *Other Testimony Given in Last Four Years.*

Cosentino v. American Tobacco, et al. New Jersey state court. I gave a deposition in this case in the summer of 1998. Its class action status was subsequently decertified and it was never tried.

Date: May 16, 2001

[s]

Jerrell H. Shofner

EXPERT REPORT BY CHRISTOPHER UGGEN, PH.D., DATED DECEMBER 6, 2001

Expert Report

by

Christopher Uggen, Ph.D.

Case: *Johnson v. Bush*
No. 00-CV-3542
U.S. District Court
Southern District of Florida
Judge James Lawrence King

1. *Introduction and Professional Qualifications*

I have been retained as an expert by counsel for the Plaintiffs in the above captioned litigation. I have prepared this report pursuant to Federal Rule of Civil Procedure 26(a)(2)(B).

I am an Associate Professor of Sociology at the University of Minnesota. I received my Ph.D. in sociology at the University of Wisconsin in 1995. A detailed record of my professional qualifications and scholarly achievements is set forth in the attached curriculum vitae, including a list of all publications I authored within the last ten years, awards, research grants, and professional activities.

This report summarizes my analysis of the number and social characteristics of people who have lost the right to vote in Florida because of a felony conviction, the social characteristics of those who have applied for and been granted

restoration of their voting rights in Florida, and the potential political impact of felon disenfranchisement in Florida. Below, I summarize the opinions I have reached, the methodology I used to reach these opinions, the data sources I have examined, and the exhibits I have constructed in conducting this research.

2. *Opinions*

Based on my analysis of aggregate criminal justice statistics and a sample of 1,217 applications for restoration of civil rights in Florida, I have reached the following opinions:

1. Approximately 827,000 felons and ex-felons, or 7 percent of the voting age population, are currently disenfranchised in Florida. Approximately three-fourths of these offenders (over 613,000) are ex-felons, persons who have completed their sentences but have not received restoration of their voting rights.

2. Approximately 167,000 African American ex-felons and almost 89,000 African American felons are currently disenfranchised in Florida, representing a total of 16 percent of the African American voting age population.

3. In the past 20 years, there has been a dramatic increase in the number and rate of disenfranchised felons and ex-felons in Florida and in the United States as a whole, particularly among African Americans.

4. Prisoners generally come from poor or working-class backgrounds and enter prison with low levels of educational and occupational attainment. Most reenter their communities with little education, few financial resources, limited work histories, and barriers to employment stemming from their felony conviction. Although some go on to success in the legitimate work world, the socioeconomic attainment of felons generally lags behind the socioeconomic attainment of non-felons.

5. According to my analysis of case files provided by the Office of Executive Clemency of the State of Florida, the typical applicant for restoration of civil rights is a white male in his forties, with a high school education or general equivalency diploma, earning about $2000 per month, with less than $1000 in liquid assets. About 16 percent of applicants are African Americans, about 60 percent are married, and about 22 percent have been convicted of a violent crime.

6. African Americans, women, and younger offenders are significantly underrepresented in the pool of applicants for restoration of civil rights in Florida.

7. Voting rights are important to ex-felons, particularly African American ex-felons. Many link voting and other forms of civic participation with their successful rehabilitation and reintegration into their communities, contending that restoration of civil rights is necessary for them to participate as full citizens.

8. African American applicants are significantly less likely to be granted restoration of voting rights than non-African American applicants.

9. Applicants with lower socioeconomic status are significantly less likely to be granted restoration of voting rights than applicants with higher socioeconomic status.

10. Those granted restoration of voting rights have significantly higher rates of marriage and home ownership than those who are not granted restoration of voting rights. Grantees also have significantly fewer felony convictions and are less likely to have a history of mental health treatment than non-grantees.

11. Race differences in the likelihood of being granted restoration of voting rights do not appear to be accounted for by race differences in criminal history.

12. Overall, the existing procedure for restoring voting rights to ex-felons in Florida does not appear to ameliorate existing racial disparities in felon disenfranchisement.

13. Felon disenfranchisement is likely to have affected the outcome of political elections, including at least one U.S. Senate election in Florida and at least one recent presidential election.

3. *Basis and Reasons for Opinion*

My opinions are based on the following results and methodology:

A. DETAILED DESCRIPTION OF RESULTS

1. Number of Disenfranchised Felons and Ex-Felons in Florida.

I estimate that over 827,000 felons and ex-felons are currently disenfranchised in Florida. About three-fourths of these offenders (over 613,000) are ex-felons, persons who have completed their sentences but have not received restoration of their voting rights. I report my estimates of the total disenfranchised, current felon, and ex-felon populations as well as race and sex breakdowns of these populations in Table 1.

2. Number and Rate of African American Disenfranchised Felons and Ex-Felons in Florida

Figure 1 shows that about 16 percent of voting age African Americans are disenfranchised relative to about 6 percent of non-African Americans. Overall, I calculate that approximately 256,000 African Americans in Florida are disenfranchised due to felony convictions. This total is composed of about 167,000 African American ex-felons and almost 89,000 African American felons currently under supervision. Because males are overrepresented in all criminal justice populations, African American males are

particularly likely to be disenfranchised. Overall, I estimate that more than one in four adult African American males in Florida is disenfranchised (about 10 percent due to a current felony conviction and about 18 percent due to a past conviction). The ratio of ex-felons to current felons differs by race, with about 2 African American ex-felons for every African American felon currently under supervision and almost 4 ex-felons of other races for every current felon of other races. This pattern is the result of race differences in recidivism rates (with very high rates specified for African Americans) as well as the smaller proportion of non-African Americans in earlier offender cohorts.

3. Historical Changes in Disenfranchised Felon Populations

There has been a significant increase in the disenfranchised felon and ex-felon populations in the past 20 years, particularly among African Americans. Table 2 shows my best estimate of these populations for selected years, suggesting that the overall number disenfranchised rose from approximately 127,000 in 1980 to over 827,000 in 2000. Over this period the disenfranchised percentage of the voting age population rose from 1.7 percent to 7 percent among all groups and from about 4.8 percent to 16 percent among African Americans.

Figure 2 shows changes in the disenfranchisement rates of African American and Non-African American Floridians since 1976. The greatest increase in the disenfranchised population occurred between 1984 and 1992. The figure shows a steep rise in the percentage of disenfranchised

African Americans beginning in the mid-1980s and continuing through the mid-1990s. The percentage of disenfranchised African Americans has stabilized since 1995, due in part to recent increases in the African American base population. Neverthel ss, the absolute *number* of disenfranchised African American felons and ex-felons has continued to rise, reaching an all-time high of over 256,000 in 2000.

The national trends are similar to those for Florida, although the affected percentage of the electorate is smaller because most states no longer disenfranchise ex-felons. Overall, approximately 5 million felons and ex-felons are disenfranchised in the United States, or about 2.4 percent of the voting age population. As Figure 3 and Table 2B shows, African Americans are far more likely to be disenfranchised than non-African Americans, with more than 7 percent of the African American population unable to vote due to a felony conviction.

4. The Socioeconomic Position of Felons and Ex-Felons

Aside from age, race, and gender data, little information has been systematically collected that would allow researchers to evaluate the social position of the current felon population. Even less has been systematically collected to describe the ex-felon population. To provide some basic descriptive information about the disenfranchised felon population in Florida, Table 3 reports characteristics of state prison inmates and characteristics of males aged 25-34 in the general population. The information is taken from my

analysis of the 1997 *Survey of State Prison Inmates*, a representative national sample of over 14,000 state prisoners, and from the U.S. Census Bureau's *Statistical Abstract* series and the U.S. Bureau of Labor Statistics' *Current Population Reports* series. As the table shows, inmates generally enter prison with low levels of educational and occupational attainment. Southern inmates averaged about 10.6 years of education, 26 percent had graduated from high school, and only about 2 percent had attained a college degree. At the time of their most recent arrest, only 60 percent reported full-time employment and their inflation-adjusted median income in the year prior to arrest was less than $15,000 (in constant 2000 dollars). In terms of both educational attainment and income, prison inmates lag far behind young men of comparable age in the general population. Nevertheless, most inmates are parents, many with small children. They generally reenter their communities with few financial resources, interrupted work histories, and barriers to employment stemming from their felony conviction. Although some go on to success in the legitimate work world, the socioeconomic attainment of felons generally lags behind the socioeconomic attainment of non-felons.

Most long-term large-scale recidivism studies are based upon official record searches, rather than follow-up interviews with released prisoners, felony probationers, and parolees. Therefore, comparatively little is known about the post-release adjustment and socioeconomic status of ex-felons. Analyses of the *National Longitudinal Survey of Youth* suggest that ex-felons experience significantly lower wage and employment levels than non-felons. Although it is difficult to make broad generalizations based on the scattered

longitudinal studies currently available, it is fair to say that most ex-felons have attained much less success in the legitimate work world than non-felons. They were generally born into poor or working class families and they enter the criminal justice system with few marketable skills and multiple barriers to employment. By the time they are released from supervision, felons have often fallen further behind their age cohort in terms of credentials and career advancement and now face additional barriers to employment stemming from the stigma of a felony conviction.

5. Characteristics of Ex-felon Applicants for Restoration of Civil Rights in Florida

Despite these barriers, many ex-felons are able to rebuild their lives and successfully reintegrate themselves into society. My analysis of case files from the Florida Office of Executive Clemency shows great diversity in the life experiences of ex-felons applying for the restoration of voting rights. As I will detail below, it is important to note that persons who apply for restoration of their voting rights are a relatively small and selective group that is not representative of the overall population of ex-felons in Florida or elsewhere. Table 4 shows characteristics of those applying for restoration of voting rights in Florida, based on my sample of applicant case files maintained by the Office of Executive Clemency. As discussed in the methodology section, I selected a disproportionate stratified sample from a list provided by the Office to examine both the typical applicant for restoration and the relationship between applicant characteristics and case outcomes. The cases are therefore weighted by their probability of selection into the sample.

Although both weighted and unweighted statistics are shown in Table 4, the weighted means and percentages provide the best population estimates of characteristics of the average or typical applicant.

According to my analysis, the typical applicant for restoration of voting rights is a white male in his forties, with a high school education or general equivalency diploma. Median income is about $2000 per month, or less than $25,000 per year in constant year 2000 dollars. I adjusted all financial information for inflation so that I could report income and assets in comparable units. Such financial information is typically not available unless a full investigation is conducted by the State. For these cases, I find that the typical applicant holds less than $1000 in liquid assets and possesses a net worth of approximately $40,000, though the large standard deviations for these characteristics suggest great dispersion in financial standing. About 16 percent of applicants are African Americans, about 60 percent are married, and about 22 percent had been convicted of a violent crime.

6. Representativeness of Applicants for Restoration of Civil Rights in Florida

To see how applicants compare with other populations of interest on some basic demographic characteristics, I conducted simple one-sample tests of significance. Table 5 and Figure 4 compare applicants for restoration of voting rights with my own estimates of the ex-felon population in Florida (the larger pool from which the applicant population is drawn) as well as the population of Southern prisoners,

and the general population of Florida residents. Applicants are significantly less likely to be African American than the ex-felon population or the population of Southern prisoners in 1997. Applicants are also more likely to be male and tend to be older than the ex-felon population. With regard to family status, applicants were as likely to be married as Florida residents in the general population, but much more likely to be married than the population of Southern prisoners. Although it is difficult to obtain good population estimates to conduct such comparisons, these results suggest that African Americans, women, and younger offenders appear to be underrepresented in the pool of applicants for restoration of civil rights in Florida.

In any given year, only a small percentage of those discharged from supervision have been granted restoration of their voting rights. As Table 6 shows, approximately 50,000 felons successfully complete supervision in Florida each year. This figure is composed of unconditional prison releases, successful parole completions, and successful felony probation completions, less those whose adjudication was withheld. We obtained data on felons leaving supervision from Bureau of Justice Statistics publications (e.g., *Correctional Populations in the United States*, *Probation and Parole in the United States*) and data on those whose civil rights have been restored from the Florida Office of Executive Clemency. In recent years there has been a dramatic decline in the percentage of new releases receiving restoration of their voting rights, from over 40 percent in 1986 to less than 4 percent in 1997, 1998, and 1999. Because ex-felons may apply for restoration at any time, the annual releases do not neatly correspond to the pool of ex-felons eligible to apply

for restoration in any given year. Nevertheless, Table 6 demonstrates that the vast majority of felons successfully completing supervision do not receive restoration of their voting rights. Moreover, the table shows a steep decline in both the rate and absolute number of felons granted restoration of voting rights in the past 15 years.

7. Significance of Restoration of Voting Rights to Ex-felons in Florida

Almost every file that I examined contained a one-page "Application for Clemency" form. One item on this form asks applicants to record their "reason(s) for requesting consideration." Some applicants left this part of the form blank or referred readers to an attached letter. To determine the relative salience of voting rights to applicants, I recorded whether voting or the restoration of civil rights was specifically mentioned on this form and whether voting appeared to be the primary reason for seeking clemency. I also assessed whether the applicant mentioned employment or occupational licensing or a need to possess or use firearms as a reason for requesting clemency. Table 7 and Figure 5 report reasons for requesting consideration by race. Most applicants mentioned voting among the reasons for requesting clemency, although African American applicants were significantly more likely to emphasize restoration of voting rights as their primary reason for seeking clemency. African Americans were also significantly less likely than non-African Americans to mention firearms authority.

8. Race Differences among Applicants for Civil Rights Restoration

I categorized the outcome of these clemency applications into those granted restoration of their civil rights, those who withdrew their applications without receiving restoration, those whose applications were returned by the clemency board because they were ineligible under the rules of executive clemency, and those whose applications were reviewed but were denied restoration of voting rights. Tables 8 and 8B show application outcomes by race for our entire sample of files (roughly 1985 to present) and for the recent period from mid-1995 to present.[1] In both cases, there is a statistically significant relationship between race and case outcome. As shown in Table 8 and Figure 6, about three-fourths of the applications overall were granted restoration of their voting rights, with approximately 79 percent of white applicants, 62 percent of African American applicants, and 67 percent of applicants of other races among the grantees. Many applications for clemency are returned as ineligible: about 10 percent of white applicants, 23 percent of African American applicants, and 24 percent of applicants of other races had their applications returned to them because they failed to cooperate with examiners or because they did not meet the formal eligibility criteria set forth in the Florida Rules of Executive Clemency. Denials are comparatively rare, comprising about 3 percent of all files. African American applicants appear to be slightly more likely than white applicants to be denied restoration of civil rights, although

1. To conserve space, I do not present a separate table for the earlier period from 1985-1995, but report all cell frequencies in Tables 7 and 7B so that this table can easily be constructed.

this difference is not statistically significant. I present a more detailed multivariate analysis of race effects on the likelihood of denial in Tables 12C and 12D discussed below in section 11 (Race Differences in Civil Rights Restoration after Statistically Controlling for Criminal History and Other Factors).

Table 8B shows application results by race for the period from approximately mid-1995 to present. I oversampled these recent cases (taking 1 in 5 from this period and 1 in 15 from early years, as discussed in the methodology section below) to characterize contemporary practices as accurately as possible. In recent years, the overall proportion of cases granted restoration of voting rights has fallen to approximately 69 percent and the proportion of cases rejected as ineligible has risen to approximately 22 percent. The association between race and case outcomes observed in Table 8 is also evident in the recent period, with African Americans less likely to be granted restoration of voting rights and more likely to have the applications returned as ineligible than whites. In sum, the pattern of race differences observed over the entire period persists when the analysis is limited to the past five years of available data.

Because the "returned to applicant" category makes up a large percentage of those cases not granted restoration of voting rights, I investigated the reasons for ineligibility. In most of the returned cases (61 percent of all files returned as ineligible), ineligible applicants owed court fees, restitution, or pecuniary penalties. Of the 172 files returned as ineligible in our sample, 22 percent of the applicants owed restitution and 50 percent owed other fees (analysis not shown). Overall,

African Americans were more likely than whites to be ineligible because of these outstanding financial obligations, as shown in Table 9. The recent waiver of eligibility rules for ex-felons with outstanding court costs and fines (see, e.g., Hiaasen 2001) is likely to reduce but not eliminate these racial disparities. African Americans were also more likely than whites to owe restitution in addition to court costs and fines, though whites tended to owe larger amounts and race differences were not statistically significant in the small sample of cases we examined.

9. Socioeconomic Differences in Civil Rights Restoration Outcomes

As the analysis of the ineligible files suggests, socioeconomic status is correlated with the probability of being granted restoration. Unfortunately, financial information is generally not reported in the file when applications are returned as ineligible. Therefore, these applicants must be excluded from any statistical analysis involving income or assets. For the subset of cases with known financial information, however, there is a statistically significant relationship between income and application outcomes. Table 10 and Figure 7 show that about 20 percent of those below the median income were not granted restoration relative to about 9 percent of those above the median. Because ineligible applicants often owed outstanding pecuniary penalties and may be unable to pay them, it is likely that the relationship between income and outcome would be even stronger if these applicants had been included in my analysis.

10. Other Differences in Civil Rights Restoration Outcomes

I conducted two-sample tests of means and proportions to see how those granted restoration of civil rights differed from those who were not granted restoration. In Table 11 and Figure 8 I report unweighted results from the disproportionate sample that includes a greater number of denials and more recent cases than would have been obtained by a simple random sample of all cases.[2] As the preceding analysis showed, those who regained their voting rights were significantly more likely to be white and less likely to be African American than those not granted restoration. I found little relationship between other demographic variables such as age and gender and restoration outcomes. With regard to socioeconomic status, grantees had higher incomes and greater net worth than non-grantees, with home ownership (often a trailer home) accounting for a large proportion of total net worth. The mean dollar figures in Table 11 are higher than the median figures reported in Table 4 because of the skewness of the socioeconomic indicators – a small number of applicants reported very high incomes and sizable assets. Grantees were also more likely to be married, although the number of children and civic and religious participation failed to distinguish grantees from non-grantees. With regard to criminal history, grantees had fewer felonies and were less likely to have been convicted of a violent felony or to have been arrested since their last felony conviction than non-grantees. Those granted restoration were also significantly less likely to have a history of mental health treatment.

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2. Weighted results are substantively similar to those reported in Table 11, although marital status and the number of prior arrests are no longer statistically significant at the .05 level.

11. Race Differences in Civil Rights Restoration after Statistically Controlling for Criminal History and Other Factors

I next examined the effects of several of these factors simultaneously to see whether the relationship between race and restoration outcomes remained after statistically controlling for the effects of criminal history and extralegal factors. It is important to caution that a multivariate analysis of this sort may be unable to account for every potentially confounding factor that may affect the relationship. Nevertheless, the logistic regression models in Table 12 allow me to adjust the bivariate race effects observed in Tables 8, 8B, and 11 for some of the most important factors that can be named and measured: felony convictions, subsequent arrests, monthly income, marital status, and other factors. As in the *t*-tests contrasting grantees and non-grantees, unweighted results are presented in Table 12. I began with a simple model of race effects and then entered each of the factors that showed a bivariate correlation with restoration outcomes in Table 11. The final model omits some of the non-significant variables with a high proportion of missing data (such as home ownership and net worth) to maximize the number of cases in the final model.

In Table 12, model 1 gives the effect of race on whether restoration of voting rights is granted without any other statistical controls. Model 2 gives the effect of race controlling for the criminal history characteristics that showed a significant bivariate association with restoration outcomes. Models 3 and 4 additionally control for other characteristics related to case outcomes. The logistic

regression coefficients in the first model suggest that the odds of an African American being granted restoration are about .54 times as high as for whites ($e^{-.623} = .536$), or put another way, that the odds for whites to be granted restoration of voting rights are about 1.9 times higher than the odds for African Americans ($e^{.623} = 1.865$). After statistically controlling for prior felony convictions, the presence of a violent felony conviction, and the number of subsequent arrests in Model 2 of Table 12, the race effect remains statistically significant. The odds of being granted restoration remain about .59 times as high for African Americans as for whites. Income is statistically significant in models that include only race and criminal history (not shown), so that for each $1000 in monthly income, the odds of being granted restoration increase by about 11 percent. When other factors such as mental health treatment, maritai status, age, and period are entered into the model, the income effects are diminished. Each of these variables is at least marginally significant, though none of them reduces the effect of race. The size of the race effects remains comparable across the three models. In model 3, which includes criminal history, income, family status, and other factors, the odds of being granted restoration remain about half as high for African Americans as for whites.

The sample size is reduced from 1204 cases with complete race and case outcome information to 475 cases with full information on each of the other independent variables. To check the robustness of the results in model 3, I imputed the sample means when information is missing on independent variables such as income. I also created missing value indicator variables to see whether those missing data

on such variables are more or less likely to be granted restoration. Although such procedures cannot produce reliable estimates of the effects of the imputed variables, they are useful for comparing race effects observed in the subsample of 475 cases in model 3 with those observed for the full sample of 1204 cases in model 4. In the latter model the African American effect is slightly reduced to -.484 but remains statistically significant: the odds of a white person being granted restoration of voting rights are about 1.6 times higher than the odds of an African American person being granted restoration.

Table 12B repeats an identical set of models, but limits the analysis to files examined in the contemporary period from mid-1995 to present. The overall pattern of results holds for the recent period, with a sizable race effect in model 1 only partially explained by criminal history and extralegal factors. In the recent period, the odds of a white person being granted restoration of voting rights are about twice as high as the odds of an African American person being granted restoration in a model without statistical controls and remain about 1.6 times as high after controlling for prior felony convictions, the presence of a violent conviction, the number of subsequent arrests, monthly income, mental health treatment, marital status, and age.

The preceding results contrast whether an applicant is granted restoration of voting rights with all other outcomes – including those who were denied restoration, those who withdrew their applications, and those who were ineligible for consideration. Another way to examine race effects on restoration outcomes is to exclude these other categories and

limit the analysis to those who were eligible for restoration of voting rights and followed through with their case until a final decision was made. By dropping all ineligible cases and withdrawals, I limit the contrast to those who were granted and those who were denied restoration. I conducted a second logistic regression analysis focusing on this subset of cases and report the results for the full sample in Table 12C and for the recent period in Table 12D. In these models, I use the same strategy and set of predictors to see how race effects change when statistically controlling for criminal history and other factors. Now, however, I predict whether one is *denied* restoration of voting rights.

Model 1 of Table 12C shows that the effect of race on denial is marginally significant ($p = .062$) over the entire period, with African Americans slightly more likely than White applicants to be denied restoration. After statistically controlling for prior criminal history and other factors, however, the contrast between whites and African Americans is more pronounced. In model 4, which includes all of these predictors, the coefficient of .694 indicates that the odds of an African American person being denied restoration of voting rights are about twice as high as the odds of a White person being denied restoration.

Table 12D examines the same contrast among the cases drawn from our oversample of files from the past five years. In the recent period the race effects are much stronger in the initial model, with African Americans significantly more likely to be denied restoration relative to Whites. Again, the race effects increase in magnitude when criminal history and other characteristics are statistically controlled. In the final model, African Americans are more than twice as likely as Whites to be denied restoration of their voting rights.

To summarize the logistic regression results presented in Tables 12-12D, African Americans remain less likely to be granted restoration of their voting rights even when many of the legal and extralegal factors associated with restoration outcomes are statistically controlled. These results hold regardless of whether the entire period from 1985-2001 is examined or whether the analysis is limited to the past five years. In models that contrast being granted restoration of voting rights against all other outcomes (including ineligibility and withdrawal), African Americans are less likely to be granted restoration. When the contrast is limited to those denied and those granted restoration, African Americans are more likely to be denied in the multivariate models. It is possible that other unmeasured characteristics may be responsible for this correlation or that key indicators such as criminal history are imperfectly measured in this analysis, or that missing data on socioeconomic or family status may have somehow biased the observed race effects. Despite these caveats, the multivariate analysis shows that race remains a strong predictor of civil rights restoration even when statistically controlling for a basic set of criminal history, socioeconomic, and family status indicators.

12. Summary of Analysis of Racial Disparities in Disenfranchisement and Restoration of Voting Rights

In sum, African Americans are more likely than non-African Americans to be disenfranchised in Florida because of a felony conviction. After analyzing a sample of case files from the Office of Executive Clemency, I conclude that African American ex-felons are less likely to apply for

clemency and less likely to have their voting rights restored than non-African American ex-felons. These race differences are due in large part to the greater likelihood that applications by African-Americans will be returned to them as ineligible for restoration as well as a greater likelihood of denial among the eligible African-American applicants. Based on these analyses, the existing process for restoring voting rights to ex-felons in Florida does not appear to ameliorate existing racial disparities in felon disenfranchisement.

13. Potential Impact of Felon Disenfranchisement on Political Elections

I am currently working on a project with Jeff Manza of Northwestern University assessing whether felon disenfranchisement is likely to affect political elections. We modeled a counterfactual scenario in which disenfranchised felons and ex-felons were permitted to vote, estimating their political behavior based on data from the non-felon population surveyed in the *National Election Study* (NES) and *Current Population Survey* (CPS). We predicted turnout rates and party preferences for each election based on the gender, race, age, income, labor force status, marital status, education, and region of the prison population, "matching" our disenfranchised felon population to the general population and obtaining an estimate of how many felons would have voted if given the chance.[3] Our results suggest that felon disenfranchisement may have played a decisive role in a number of U.S. Senate and presidential elections.

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3. After this procedure, we "deflate" our turnout estimates for CPS overreporting. We multiply our turnout estimate by the overall ratio of actual turnout to reported CPS turnout for each election (which reduces the estimate by 25-35%).

States vary dramatically in punishment rates as well as the particular correctional populations disenfranchised. Some states disenfranchise only current prisoners, some only current prisoners and parolees or probationers, and some allow even prisoners to vote. Therefore, the political impact of felon disenfranchisement also varies by state. In a state such as Florida, which disenfranchises many felony probationers, parolees, prisoners, and ex-felons, the potential political impact is sizable.

Our analysis suggests that felon disenfranchisement may have played a role in at least one recent U.S. Senate election in Florida. Because felons are drawn disproportionately from the ranks of racial minorities and the poor, disenfranchisement laws tend to draw votes from Democratic candidates who have historically drawn heavy support from these groups. To determine the *net* Democratic votes lost to disenfranchisement, we first multiply the number of lost felon voters by their estimated turnout rate and probability of voting for the Democratic candidate. Since some felons would have chosen Republican candidates, we then deduct from this figure the number of Republican votes lost to disenfranchisement, which we obtain in a similar manner. For the 1988 Florida election detailed in Table 13, we estimate that 71,323 of the state's 293,512 disenfranchised felons would have voted if permitted to do so (24.3 percent). We calculate that 59,127 of these would have selected Buddy MacKay, the Democratic candidate (82.9 percent of 71,324), and that the remaining 17.1 percent (or 12,196) would have chosen Connie Mack, the Republican candidate. This produces a net total of 46,931 Democratic votes lost to felon disenfranchisement, more than enough to overturn the

actual Republican victory margin of 34,518 votes. Under the counterfactual scenario, the Democrat MacKay may have defeated the Republican Mack by over 12,000 votes. Table 13 also presents several other closely contested U.S. Senate elections that may have been affected by felon disenfranchisement. Assuming that Democrats who might have been elected in the absence of felon disenfranchisement had held their seats as long as the Republicans who narrowly defeated them, the Democrats may have gained parity in the 1984 Senate and may have maintained majority control of the U.S. Senate from 1986 to the present.

For the 2000 presidential election, we calculated a turnout rate of 21.6 percent and a Democratic preference of 74.5 percent for our hypothetical felon voters. Applying these percentages to the disenfranchised felon population, we find that the Democrat Al Gore would have won the popular vote by approximately one million votes and the state of Florida by over 85,000 votes. If the approximately 827,000 disenfranchised felons and ex-felons in Florida had been allowed to vote, Gore would almost certainly have carried the state and the election, as shown in Table 14. Even if we apply much more conservative turnout and party preference estimates, felon disenfranchisement would likely have affected the outcome. If we assume only 10% turnout, and 60% Democratic preference, the Democrat Gore would have won by over 14,000 votes. If we consider only ex-felons and ignore parolees, probationers, prisoners, and convicted jail inmates, the Democrats would have carried the state (and hence the election) by over 10,000 votes. Therefore, the election appears to have hinged on the narrower question of ex-felon disenfranchisement rather than the broader question

of voting restrictions on current felons (prisoners, parolees, and felony probationers).

Although the 2000 presidential election was unusually closely contested, the margin of victory in 4 of the last 10 presidential elections has been 1.1 percent of the voting age population or less. With over 2 percent of the voting age population currently disenfranchised due to a felony conviction, felon disenfranchisement is likely to be an important factor in future elections as well.

B. SUMMARY OF METHODOLOGY FOR ESTIMATING THE NUMBER AND CHARACTERISTICS OF EX-FELONS

I estimated the Florida ex-felon population using a technique developed in the course of my National Science Foundation project with Jeff Manza of Northwestern University. I determine the number of disenfranchised ex-felons based on exits from, rather than entry into, correctional supervision. I start with the number of felons released from supervision each year since 1948. I then use demographic life tables to compute the number of these releasees lost to recidivism and mortality annually. Both groups are removed from the disenfranchised population, the recidivists because they would be counted among the "current" felon population, and the deaths because they are no longer at risk of voting. Each existing cohort of disenfranchised releasees is thus successively reduced each year and joined by a new cohort of releasees, allowing me to compute the number of ex-felons no longer under supervision. From the total disenfranchised population, I also deduct the number of felons whose voting

rights were restored through restoration of civil rights each year as well as the number of felony probationers whose adjudication was withheld pending successful completion of their conditional sentence.

1. Key Assumptions

I briefly note the key assumptions underlying my estimates of the ex-felon population.

Recidivism. My analysis assumes that most ex-felons will re-offend and that the hazard of reoffense is greatest in the first years following release from correctional supervision. For prison and parole recidivism I base my race- and sex-specific recidivism rates on a five-year study of new offenses by the Florida Department of Corrections (1999), and a three-year study of re-incarceration for Florida's prisons by the Florida Office of Program Policy Analysis and Government Accountability (1995). I extend these rates beyond five years based on a logarithmic trend line, fitting Florida data to recidivism patterns observed in other longer-term follow-up studies (Hoffman and Stone-Meierhoefer 1980; Broadhurst and Maller 1990), ultimately reaching an average 79 percent lifetime recidivism rate. My race- and sex-specific 5-year recidivism rates are 49 percent for white men and 72 percent for African American men, with lifetime rates ranging from 66 percent for white men to 88 percent for African American men. Applying this very high lifetime recidivism rate to the African American male data produces a very *conservative* estimate of the number of African American ex-felons, since a greater number of African American ex-offenders are subtracted from the ex-felon pool

with each successive year. Because Florida-specific probation and jail recidivism rates are generally unavailable, I use the national rate provided by the Bureau of Justice Statistics (*Recidivism of Felons on Probation, 1986-89*), and adjust it upward based on Florida's sex- and race-specific prison and parole recidivism rates. The result is a 5-year probation and jail recidivism rate of 55 percent overall (and 64 percent for African American men), and lifetime rates of 71 percent overall (and 81 percent for African American males).

Mortality: My mortality rates are age-, race-, and sex-specific, taken from the *Statistical Abstract of the United States*. I assume that ex-felon mortality is greater than comparable rates for non-felons because of the high rates of mortality observed in earlier recidivism studies. I calculate mortality rates based on the modal age of offenders released in each year and the average mortality rate for persons of comparable age in the general population that year. Each age-adjusted annual rate is multiplied by a constant felon multiplier (approximately 1.46) to adjust for the greater mortality of felons and to match the death rate observed in a three-year national recidivism study (*Recidivism of Prisoners Released in 1983*).

Mobility: According to the rules of executive clemency (as revised June 2001), a person who has been convicted of a felony in another state or in a federal court must submit an application for restoration of civil rights in accordance with the application rules for Florida convictions. Because Florida's in-migration exceeds its out-migration over the period of study (see, e.g., *Statistical Abstract of the United States*) the number of felons entering Florida from other states

almost certainly exceeds the number of Florida felons who leave the state. Therefore, the net effect of migration is to increase the total disenfranchised population. I do not attempt to model net mobility in this report, rendering my estimates lower or more conservative than they would be had I incorporated migration. In fact, it is likely that a large number of current Florida residents are disenfranchised due to a felony conviction in another state. Florida birth origin information from the 1990 census indicates that about 55 percent of Florida residents were born in other U.S. states (about 46 percent being born in states that do not permanently disenfranchise ex-felons and about 9 percent being born in states that permanently disenfranchise ex-felons). Whereas over 7 million Florida residents in 1990 were born in another state, only 1.4 million of those born in Florida had moved to another state. To the extent that ex-felon migration mimics these broader patterns observed in the general population, a sizable number of disenfranchised ex-felons could be added to the estimates presented here.

Civil Rights Restoration: I obtained the number of felons granted restoration for each year since 1964 directly from the Florida Office of Executive Clemency. I then applied the mortality rate for white male offenders and the recidivism rate for Florida first releasees to this population to reflect the preponderance of first offenders in the clemency population. My analysis of clemency files showed that white ex-felons were more likely to apply for restoration and more likely to be granted restoration of voting rights than African American ex-felons. Based on population estimates obtained from these data, I apportioned the total clemency grantees by race and sex for the periods prior to 1990 (when 13.1

percent of applicants and 11.0 percent of grantees were African American), 1990 to 1995 (when 13.6 percent of applicants and 11.2 percent of grantees were African American), and 1996 to present (when 19.5 percent of applicants and 15.2 percent of grantees were African American).

Adjudication Withheld: In Florida, many offenders can avoid formal felony adjudication (and, hence, disenfranchisement) by successfully completing a period of probation. According to the Florida Department of Corrections, as much as 40 percent of the total probation population holds adjudication withheld status. This proportion is likely to be lower among the pool of *felony* probationers than among misdemeanant probationers. Moreover, according to the Bureau of Justice Statistics *Probation and Parole* data series (e.g., 1995, p. 35), approximately 50 percent of Florida probationers successfully complete probation. I therefore estimate that 40 percent of Florida felony probationers are placed in adjudication withheld status and that half of this group successfully completes probation and avoids adjudication and the loss of voting rights. I thus reduce my annual felony probation numbers by 40 percent in computing the disenfranchised current felon population and by 20 percent in calculating the number of disenfranchised ex-felony probationers (.4 * .5 = .20).

2. Potential Sources of Error and Compensating Factors

Though I believe these procedures provide an accurate estimate of the disenfranchised felon and ex-felon population, I should note that the resulting figures are estimates rather than precise counts. There are a number of possible sources of error, including:

Missing Data. Prior to the mid-1970s, the quality of available data on the number of felony probationers and the race and sex distribution of other correctional populations are problematic. I therefore only report estimates since 1980 in this report. Missing data problems and interpolation procedures are outlined below in the section on data sources.

Recidivism. My best estimate uses group-specific five-year Florida recidivism rates and extends these rates to align with longer-term national and international recidivism studies. Without evidence from repeated 50-year longitudinal studies, it would be difficult to verify these lifetime recidivism and mortality rates. To address these concerns, I applied a significantly *higher* recidivism rate than the national average, resulting in a lower, more conservative estimate of the disenfranchised ex-felon population. This is especially the case with the estimates for African American males. Despite these precautions, however, some error may remain in my recidivism estimates.

Adjudication Withheld: My best estimate assumes that 40 percent of all felony probationers were given a sentence of adjudication withheld and that half of them successfully

completed probation with no loss of voting rights. Because these figures are only approximations, it is possible that my estimates of the current felon population and, to a lesser extent, the ex-felon population may be inaccurate.

Clemency. My year-specific clemency estimates are reduced for mortality and recidivism, albeit at lower rates than other felon populations. It is possible, however, that recidivism and mortality rates among those granted clemency are even lower than I have estimated.

Double Counting. I have taken pains to avoid counting the same person more than once in a single year. Nevertheless, it is possible that a small number of frequent recidivists, those with multiple prison or probation admissions during a single year, and those cycling rapidly through different stages of the criminal justice system may have been counted twice. For this reason, I use a high lifetime recidivism rate for prisoners and parolees (79 percent overall, 88 percent for African American males) and for probationers and jail inmates (71 percent overall, 81 percent for African American males) to offset the possibility of double counting in any particular year. I also found comparable estimates when validating this technique with alternative estimation procedures based on first release data.

Noncitizens. Legal and illegal immigrants are ineligible to vote in Florida. Therefore a small percentage of disfranchised ex-felons in Florida may have been unable to vote regardless of their felony conviction. My estimates of Florida's disfranchisement *rate*, however, are unlikely to be significantly biased since noncitizens are included in the

voting age population denominator as well as the disenfranchised felon numerator. Because detailed data on noncitizens in the state criminal justice system are unavailable, I can only crudely estimate the size of this population. From an Urban Institute report on illegal aliens in the criminal justice system (Clark and Anderson, 2000), approximately 1,572 illegal aliens were incarcerated in Florida state prisons in 1995. A Bureau of Justice Statistics special report on *Noncitizens in the Federal Criminal Justice System* (1996) found that approximately 55 percent of all noncitizens in Federal prisons are legal immigrants and 45 percent are illegal immigrants. Applying these percentages to Florida state prison numbers, it would suggest that approximately 3,493 of the state's 1995 prison population of 63,879 were noncitizens, or approximately 5 percent. If Florida trends mirrored trends in the Federal system, a smaller percentage of inmates would have been noncitizens in years prior to 1995; I estimate less than 3 percent in 1984. Therefore, there are likely to be proportionally fewer noncitizen ex-felons than noncitizens currently under supervision. In sum, my procedure may include a number of noncitizens among the disfranchised felon population. I believe this is unlikely to significantly affect my estimates of the disfranchisment rate, but it may have biased my estimates of the disfranchised population upward. If trends in Florida paralleled trends in the federal system, the magnitude of this bias is likely to be 5 percent or less.

Compensating Factors. Though consideration of these factors may have *reduced* my best estimate of the disenfranchised population to some extent, I also excluded several categories that would have *increased* this estimate.

For example, I did not include current federal prisoners (11,384 were held in Florida institutions in June, 2001), federal parolees (over 5,000 of whom were supervised in Florida in 1998), federal felony probationers (about 1,800 were supervised in Florida in 1998), or federal ex-felons; I only include 10 percent of the jail population; and, I did not account for the large numbers of felons moving to Florida from other states who would also be barred from voting in Florida.

C. SUMMARY OF METHODOLOGY FOR ANALYZING THE CHARACTERISTICS OF APPLICANTS AND GRANTEES FOR RESTORATION OF VOTING RIGHTS

I estimated the characteristics of applicants for restoration of voting rights by examining inactive case files provided by the Office of Executive Clemency of the State of Florida. Melissa Thompson, a doctoral student under my supervision, traveled to Florida on May 14, 2001 to sample approximately 1,300 case files for analysis. The State provided a list of all such files to serve as our sampling frame. The Office of Executive Clemency does not typically open a case file for those eligible for automatic restoration of civil rights unless they receive some objection to restoration. Therefore, our sampling frame of applicants did not include many grantees who received restoration without a hearing. We stratified this list by case outcome (whether restoration was denied or not) and period (oversampling files from the past five years). From each of these lists, we selected each of the denied cases, and then took a systematic random sample of 1 in 15 of the cases more than five years old and 1

in 5 of the more recent cases. We used this disproportionate stratification method, oversampling denials and recent cases, to provide sufficient numbers for an analysis of recent case outcomes. In presenting population estimates for these data, we assign weights to each observation that are proportional to the inverses of the selection probabilities within each stratum. Once each of the active cases we selected and older cases that had already been destroyed were removed by the State of Florida, we were left with a sample of 1,217 inactive cases.

I received photocopies of the case files on June 7 and June 14, 2001. We recorded information from each case onto a code sheet and then entered the code sheets into an SPSS data file for analysis. Aside from myself, the only persons with access to the files were my research assistants, who coded the data (Melissa Thompson, Angela Behrens, Amy Blackstone, and Michelle Lopez). We examined almost 60,000 pages of text in creating the analysis file of 1,217 cases. Although it is possible that some errors may have occurred in reading, coding, and entering so much data in less than one month, we took steps to minimize the likelihood of systematic biases or repeated errors in coding: each of the coders was experienced in social research and specially trained for this study; we worked together around a conference table to share information and develop a set of common coding conventions; all computer data entry was conducted by the two most experienced research assistants; and, I supervised data collection and coded a large number of files alongside the other coders.

1. **Strategy of Analysis.**

The tables first describe the characteristics of applicants for civil rights restoration, presenting my point estimates of population means, percentages, and standard deviations. To determine whether applicants differ from the general pool of ex-felons in Florida, the population of Southern prisoners, and the Florida general population, I use one-sample *t*-tests comparing the sample data against the population values for these groups. I then show bivariate cross-tabulations of case outcomes with race and income to determine whether these factors are associated with voting rights being granted or not granted. Next, I compare characteristics of grantees with non-grantees using two-sample tests of means and proportions. Finally, I present a multivariate logistic regression model predicting whether restoration of voting rights was granted (coded 1 in this analysis) or not granted (coded 0 in this analysis). The multivariate analysis enables me to adjust the estimated effects of race on civil rights restoration after statistically controlling for the effects of criminal history and other factors that may be related to race and crime.

2. **Coding Conventions**

For purposes of our analysis for this report, we adopted the following coding conventions:

Case Outcome. The clemency files sometimes included multiple applications for multiple purposes. We recorded data from the most recent application pertaining to voting rights. For example, if voting rights were restored in 1997 but the authority to own firearms was denied in 1999, we recorded information relating to the earlier restoration of civil rights.

Race and Ethnicity. We recorded the self-reported race of applicants from the one-page application form. Ethnicity information was generally unavailable, although we coded Hispanic ethnicity by comparing applicants' names with lists of Hispanic surnames prepared by the Census Bureau. Although descriptive statistics are reported for the constructed Hispanic indicator, we relied on applicants' self-reported race in all analyses of race effects on restoration outcomes.

Socioeconomic Status. For ease of comparison across years, all dollar amounts have been adjusted for inflation and converted to constant 2000 dollars. For married applicants, we included assets held jointly (such as the equity in a home) in computing assets. In determining liquid assets, we counted savings, checking, and money market accounts, but excluded retirement or pension funds. Net worth refers to the difference between total assets and liabilities. In computing liabilities, we excluded monthly living expenses. In determining years of education, we recorded the highest grade of schooling completed. We counted those who had obtained a general equivalency diploma (GED) as having twelve years of education, those obtaining an Associate's degree as having fourteen years of education, a Bachelor's degree as 16 years, a Master's or Law degree as 17 years, and a Ph.D. as 18 years.

Family Status. We recorded the total number of applicant's children, including stepchildren.

Criminal History. In computing the number of prior felony convictions, we count all felony convictions up to

and including the most recent conviction that resulted in the loss of voting rights. In determining subsequent arrests, we count all new arrests after release from supervision, excluding traffic offenses. To categorize an offense as a violent crime, property crime, drug crime, or other crime, we referred to standard Bureau of Justice Statistics classifications (U.S. Department of Justice, *Correctional Populations in the United States*).

Mental Health and Substance Use. In determining mental health treatment, we excluded screening evaluations and self-help groups. To determine substance use history, we counted those with any self-reported history or official conviction for illegal drug use.

4. *Data and Other Information Considered in Forming Opinion*

In forming my opinions, I have considered the following materials:

Prison and Parole Population. The number of unconditional prison releases and parole entries was obtained from Bureau of Justice Statistics annual data series and publications for the years 1948-1998 (e.g. *Correctional Populations in the United States; Sourcebook of Criminal Justice Statistics* (1972-1998); *National Prisoner Statistics: Prisoners in State and Federal Institutions* (1948-1967); *Race of Prisoners Admitted to State and Federal Institutions; National Corrections Reporting Program*). Prison Population data are available on the BJS website for 1977-1998 (*Prisoners under State or Federal Jurisdiction, Federal and*

State-by-State, 1977-98). 1999 and 2000 figures are also available online (*Prisoners in 1999 and Prison and Jail Inmates at Midyear 2000*), although the 2000 figure refers to the population on June 30, 2000 while all other years refer to the population count on December 31st. For years in which data were unavailable (1968-1971; 1980 and 1985), I interpolated estimates based on the immediately preceding and subsequent years. From these sources, we took the unconditional and conditional releases from prison for each year. From the total release figures, we subtracted the number expected to die and recidivate in each of the following years.

Probation and Jail Population. The number of felony probationers was also obtained from Bureau of Justice Statistics sources, such as *Probation and Parole in the United States*. These provide the total number of adults entering probation, along with adults on probation by type of offense (felony versus non-felony). Using the percentage of felony probationers, I estimate the number of those entering probation for a felony. For the years 1976-1984, I use the 1985 national percentage of those entering probation (approximately 63%) and apply it to the total felony probation population. When the Florida-specific percent of felony probation figure was unavailable, I used the national felony probation percentage. Jail population data are taken from Bureau of Justice Statistics Sources such as "*Profile of Jail Inmates 1996*." Although few jail inmates are likely to vote from jail, my estimate only counts 10 percent of the mid-year jail population. I adopt this conservative figure to avoid counting misdemeanants and persons who have not yet been convicted of crimes among the disenfranchised, and to avoid double-counting felons who would also appear in other correctional populations (e.g., prison or felony probation).

Racial Composition. Historical race breakdowns are most consistently reported for prison populations. Therefore we developed a multiplier using the percentage of African American prisoners in each state in each year as our baseline, and we adjusted probation, parole and jail figures in relation to the state's change in the ratio of African American to non-African American prisoners.

Voting Age Population. Voting age population (VAP) data from the U.S. Bureau of Census *Current Population Reports*, reproduced in the *Statistical Abstract* series and online (http://www.census.gov/prod/3/98pubs/p25-1132.pdf).

Prison and Parole Recidivism. I use race- and sex-specific recidivism rates, drawn from a five-year study by the Florida Department of Corrections (1999) and a three-year study by the Florida Office of Program Policy Analysis and Government Accountability (1995). I extend these rates beyond the study period based on other long-term follow-up studies (e.g. *Recidivism of Prisoners Released in 1983;* Hoffman and Stone-Meierhoefer 1980; Broadhurst and Mallar 1990).

Probation and Jail Recidivism. I use the national rate provided by the Bureau of Justice Statistics (*Recidivism of Felons on Probation, 1986-89*), and adjust it based on Florida's sex-and race-specific recidivism rates. The result is a 5-year probation/jail recidivism rate of 55 percent (64 percent for African American men).

Political Participation Data. For my political impact analysis with Jeff Manza, we utilize standard election data sources. To estimate the expected turnout of the disenfranchised population, I use data from the Voting Supplement of the Current Population Survey (CPS). The CPS is a monthly survey of individuals conducted by the Bureau of the Census. Since 1964, in each November of even-numbered (national election) years, the survey includes questions about political participation. All sampled households are asked, "In any election some people are not able to vote because they are sick or busy or have some other reason, and others do not want to vote. Did [you/another household member] vote in the election on November __?" Our estimates of the expected vote choice of disenfranchised voters are based on National Election Study (NES) data, for the period 1972-2000.

Interview Data. In addition to my analysis of the Florida case files, I have also conducted 34 intensive interviews with prison inmates, probationers, and parolees in Minnesota. Each interview lasted approximately one hour, with open-ended questions addressing voting rights, citizenship, reentry, and reintegration.

5. *Exhibits*

Attached are Tables 1-14 and Figures 1-8 that summarize and support my opinions.

6. *Compensation*

I am being compensated $150 per hour for my work in connection with this litigation.

7. *Other Expert Testimony Given in Last Four Years*

None.

Date: December 6, 2001

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Christopher Uggen

Table 1. Disenfranchised Felons and Ex-Felons in Florida, 2000

Category	12/31/2000 Estimate
Total Disenfranchised	827,207
Voting age population (VAP)	11,774,000
As % of VAP	7.0%
Ex-Felons	613,514
As % of VAP	5.2%
Current Felons	213,693
As % of VAP	1.8%
African American Total Disenfranchised	256,392
Afr.-Am. VAP	1,600,000
As % of Afr.-Am. VAP	16.0%
Male Afr.-Am. Total	205,667
Male Afr-Am. VAP	745,000
As % of Afr.-Am. Male VAP	27.6%
Female Afr.-Am. Total	50,725
Female Afr.-Am. VAP	855,000
As % of Afr.-Am. Female VAP	5.9%
African American Ex-Felons	167,413
As % of Af.-Am. VAP	10.5%
Male Afr.-Am. Total	130,789
As % of Afr.-Am. Male VAP	17.6%
Female Afr.-Am. Total	36,625
As % of Afr.-Am. Female VAP	4.3%

African American Current Felons	88,978
As % of Af.-Am. VAP	5.6%
Male Afr.-Am. Total	74,878
As % of Afr.-Am. Male VAP	10.1%
Female Afr.-Am. Total	14,100
As % of Afr.-Am. Female VAP	1.6%
Non-African American Total Disenfranchised	570,815
Non-African American VAP	10,174,000
As % of Non-African American VAP	5.6%
Non-African American Ex-Felons	446,100
As % of Non-African-American VAP	4.4%
Non-African American Current Felons	124,715
As % of Non-Afr.-Am. VAP	1.2%

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FLORIDA DISENFRANCHISED FELON AND EX-FELON POPULATIONS (BEST ESTIMATES FOR 1967 AND 1968), PRODUCED BY EXPERT CHRISTOPHER UGGEN, PH.D.

Florida Disfranchised Felon and Ex-Felon Populations (Best Estimates for 1967 and 1968)
Produced by Plaintiffs' expert Christopher Uggen, Ph.D.

(Originally submitted as Addendum to Plaintiffs' Reply Brief in Support of Motion for Summary Judgment)

The African American disfranchisement rate was more than double the non-African American disfranchisement rate during the 1967-1968 period in Florida. About 3 percent of African Americans were disfranchised for a current or former felony conviction relative to about 1.2 percent of non-African Americans. Ex-felons made up about 2 percent of the Florida African American population, relative to less than 1 percent of the Florida non-African American population.

Table 1 presents detailed estimates and Figures 1 and 2 compare the race distribution of ex-felons and the total disfranchised population for 1967 and 1968 respectively.

Table 1. Florida Disfranchised Felon and Ex-Felon Populations (Best Estimate for Selected Years)

Category	*1967*	*1968*
Total Disenfranchised	57,356	60,712
Voting Age Population (VAP)	3,998,750	4,124,000
As % of VAP	1.43%	1.47%
Ex-Felons	40,624	42,458
As % of VAP	1.02%	1.03%
Current Felons	16,732	18,253
As % of VAP	0.42%	0.44%
African American		
Total Disenfranchised	15,215	16,150
African American VAP	510,700	516,800
As % of African American VAP	2.98%	3.13%
African American Ex-Felons	9,722	10,161
As % of African American VAP	1.90%	1.97%
African American Current Felons	5,493	5,989
As % of African American VAP	1.08%	1.16%
Non-African American		
Total Disenfranchised	42,141	44,562
Non-African American VAP	3,488,050	3,607,200
As % of Non-African American VAP	1.21%	1.24%
Non-African American Ex-Felons	30,902	32,297
As % of Non-African American VAP	0.89%	0.90%
Non-African American Current Felons	11,239	12,264
As % of Non-African American VAP	0.32%	0.34%

EXCERPTS OF ARTICLE BY JERRELL H. SHOFNER, "THE CONSTITUTION OF 1868"

THE FLORIDA
HISTORICAL QUARTERLY
VOLUME XLI APRIL, 1963 NUMBER 4

* * *

This Constitution was not imposed on a reluctant and helpless population, nor was it the work of benevolent Northerners who wisely provided an equalitarian organic law for the protection of the newly-freed Negroes. It was the product of a struggle between groups of men with widely differing interests. The struggle took place within the framework laid down by the Congress controlled by radical Republicans, but this framework left room for compromise and concession. For reasons of their own, the radicals in the Constitutional Convention were unbending in their demands for Negro equality and punishment of ex-Confederates. Native Conservatives, though deprived of participation in the Convention, constituted an important part of Florida's population. They were unwilling to be subjected to domination by northern radicals supported by a Negro electorate.

The normal political process of open debate and open voting broke down in this extreme circumstance. Thereafter, compromise and concession occurred behind the scenes. The unbending radicals lost out to a group of moderate Republicans who were willing to collaborate with certain Conservative leaders, and the Monticello constitution was drafted to their mutual benefit. The two Conservative delegates who joined the Convention only after the Monticello secession were important to the moderates in the closely divided Convention. Governor Walker's efforts to keep the radicals from recapturing the Convention hall were also vitally important. Less tangible, but

just as important, was Conservative willingness to rely on vocal and editorial criticism rather than more extreme forms of resistance.[44] Osborn had maintained good relations with the military, but General Meade was probably impressed by Osborn's support from some of the local leaders.[45]

Considering their political disability, the Conservatives were well rewarded for favoring the moderates. The apportionment provision insured continued white control, and the mild proscriptive feature against ex-Confederates enabled them to resume political activity. Wide appointive powers resting with the governor aided both Conservatives and moderate Republicans as long as they could elect the chief executive. Willingness to vest such power in the chief executive indicates their confidence in an election victory.[46] When moderate candidate Harrison B. Reed became governor, he rewarded

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44. Conservative opposition was held in check by fear that the convention might re-assemble and adopt a constitution which excluded ex-Confederates from suffrage. *See* Mariano D. Papy to Edward M. L'Engle, March 10, 1868, and Stephen R. Mallory to L'Engle, April, 3 1868, in L'Engle Papers.

45. George R. Bentley, "Freedmen's Bureau in Florida," *Florida Historical Quarterly*, XXVIII (July, 1949), 29-31.

46. Scroggs, "Carpetbagger Constitutional Reform," 492. Local control was maintained by whites through this device until 1885, but there was increasing opposition to such an undemocratic system in the white counties. After 1885, Conservatives felt secure enough to alter the system. The weak executive of the 1885 Constitution was partly a reaction to the excessively strong powers wielded by the governor under the 1868 Constitution. After1885, Negroes were controlled by a poll tax requirement for voting, appointive county commissioners, and bonding requirements for county officials. See Collins, "Florida Constitution of 1885," 1, 120-125, *passim.*

prominent Conservatives with appointments to cabinet positions.[47]

The radical leaders lost because they asked too much and could not accept less since their entire support came from Negroes. Numbering less than half of Florida's population, Negroes were unable to control the government. To do so, they would have had to form an agreement with some element of the white population more numerous than that represented by the radicals. Unlike the radicals, the moderate Republicans were willing to seek support wherever it could be found. If the radicals were defeated, the moderates would then be able to mend their fences with the Negroes. A case in point was Saunders' desertion of the radicals when the moderate Constitution was accepted by Congress. Even Jonathan C. Gibbs and J. H. Goss, the native white radical from Marion County, advised all Republicans to unite and support Reed and the Constitution. It was easy for many moderate Republicans to make concessions to white supremacy since some of them were sympathetic to this principle. W. J. Purman, who had led the parliamentary fights for the moderates, later boasted that he had kept Florida from becoming "niggerized."[48]

* * * *

47. Brevard, *History of Florida*, II, 146. Robert H. Gamble became comptroller and James D. Wescott, Jr., became attorney-general.

48. Bentley, "Freedmen's Bureau in Florida," 36; Jacksonville *Florida Union*, March 21, April 4, 1868; Tallahassee *Weekly Floridian*, August 20, 1872.

JOURNAL OF THE PROCEEDINGS OF THE CONSTITUTIONAL CONVENTION OF THE STATE OF FLORIDA, FEBRUARY 20, 1868, AT 48-49

TWENTY-SIXTH DAY.

THURSDAY, February 20, 1868.

The Convention met pursuant to adjournment.

Prayer by the Chaplain.

The roll being called, the following members answered to their names:

Mr. President, Messrs. Alden, Armistead, Bass, Bryan, Bradwell, Campbell, Cessna, Chandler, Childs, Cone, Dennett, Goss, Hill, Krimminger, McRae, Meacham, Mizell, Mobley, Oates, Osborn, Pearce, Powell, Rogers, Rowley, Shuler, Ware, Urquhart and Wyatt—29.

A quorum present.

On motion, Mr. Rombauer was excused from attendance, owing to sickness.

On motion, the reading of the journal of yesterday was dispensed with.

Mr. Osborn offered the following resolution:

Whereas, It has come to the knowledge of this Convention that J.B. Oliver has in his possession the printed Journal of this Convention, up to the 3d inst.; therefore,

Be it resolved, That the Committee on Printing be and it is hereby authorized to confer with J.B. Oliver, and ascertain at what price said Journal can be purchased, and report the result of their conference to this convention;

Which was adopted.

Mr. Alden offered the following resolutions:

Resolved, That the Journal of the Constitutional Convention of the State of Florida, from its organization until the 3d day of February, be recognized as the only journal of the Convention to that date. Thereafter, that all proceedings of this Convention, except the meeting and adjournment of the Convention, be expunged from the Journal, until the 18th February, 3 p.m., from which time the Journal shall be resumed and kept complete.

Mr. Cessna moved the previous question, upon which the vote was:

Yeas—Mr. President, Messrs. Alden, Bryan, Campbell, Cessna, Childs, Dennett, Erwin, Fortune, Howse, McRae, Mizell, Mobley, Osborn, Pearce, Powell, Rogers, Rowley, Shuler, Ware, Urquhart—20.

Nays—Messrs. Bass, Bradwell, Chandler, Cone, Davidson, Gibbs, Goss, Hill, Johnson, Krimminger, Meacham, Oates, Walls, Ware and Wyatt—15.

So the previous question was ordered.

Upon the adoption of the resolution, the yeas and nays being called for, the vote was:

Yeas— Mr. President, Messrs. Alden, Armistead, Bryan, Campbell, Cessna, Childs, Dennett, Erwin, Fortune, Howse, McRae, Mizell, Mobley, Osborn, Pearce, Powell, Rogers, Rowley, Shuler, Ware, Urquhart—21.

Nays—Messrs. Bass, Bradwell, Chandler, Cone, Davidson, Gibbs, Goss, Hill, Johnson, Krimminger, Meacham, Oates, Walls, Ware and Wyatt—15.

So the resolution was adopted.

On motion of Mr. Fortune, His Excellency David S. Walker was invited to address the Convention.

He was introduced by the President, and addressed the Convention.

Mr. Mobley offered the following resolution:

WHEREAS, The New York Tribune of the 5th, 8th and 10th of February contains letters purporting to have been written from the city of Tallahassee by one Solon Robinson, maliciously assaulting the private character and public conduct of a majority of the members of this Convention, and grossly misrepresenting the proceedings and purposes of this body; AND WHEREAS, the said malicious misrepresentations have been endorsed and approved by the editors of said paper, in the issue of the 10th inst; AND WHEREAS, the said assaults and misrepresentations are calculated, if not

intended, to bring dishonor upon the Republican cause, create dissention and hinder the establishment in Florida of a government of equal laws; therefore,

Resolved, 1st, That Solon Robinson has violated the courtesy extended him by this body, and rendered himself unworthy of the honor conferred upon him as a representative of the press, and unworthy of the confidence of the friends of reconstruction

Resolved, 2, That the New York Tribune in publishing with apparent approval the false and malicious fabrications of its mendacious (if not subsidized) correspondent, has forfeited the respect of this body, and is no longer entitled to be represented by him upon the floor of this Convention.

EXPERT REPORT BY THEODORE CHIRICOS, PH.D., DATED JUNE 21, 2001

Expert Report

by

Professor Theodore Chiricos, Ph.D.

Case: *Johnson v. Bush*
No. 00-CV-3542
U.S. District Court
Southern District of Florida
Judge James Lawrence King

1. *Introduction and Professional Qualifications*

I have been retained as an expert by counsel for the Plaintiffs in the above captioned litigation. I have prepared this report pursuant to Federal Rule of Civil Procedure 26(a)(2)(B).

I am a Professor in the School of Criminology and Criminal Justice at Florida State University, where I have been employed since receiving my Ph.D. in Sociology from the University of Massachusetts. My published research includes several articles examining the role of race in criminal justice outcomes. The first of these articles reports the results of a 1972 study of the withholding of adjudication for those sentenced to probation in Florida. Others include a 1995 review and meta-analysis of all published research on the effect of race on criminal sentencing and a 1996 study of the role of race in the sentencing of habitual offenders in Florida.

In 1999, I was invited to address a panel of the National Research Council in Washington, D.C., on the question of racial disparity in the juvenile justice system. In 1993, I gave an invited plenary session address on the topic of race and punishment at the annual joint conference of the Bureau of Justice Statistics and the Justice Research Statistics Association. In 1991, I was one of 24 scholars from the U.S., Canada, and Europe invited to make a presentation at the "State of the Art Conference" on inequality, crime and social control, jointly sponsored by the University of Washington and the University of Georgia.

In 1993, I testified on the question of racial disparity in the prosecution and sentencing of habitual offenders in Florida in hearings conducted separately in Polk and Leon counties.

In 1998, I was recognized as the 11th most frequently cited criminology professor in the United States based on citations in six major criminology and criminal justice journals for the period of 1991-1995 (Cohn and Farrington, 1998: 203). I currently serve as an advisory editor for *Criminology*, the foremost journal in our field, and for *Social Problems*, the foremost sociology journal with a specific focus on problems related to crime and justice.

Attached is a curriculum vitae setting forth my professional background, which includes a list of all publications I authored within the last ten years.

2. *Opinions*

I have reached the following opinions:

Blacks in Florida are disproportionately represented among those convicted of felony crimes. This is true whether the standard of disproportionality is (1) the proportion of Florida's population that is black or (2) racial differences in criminal involvement.

When arrest is used as a proxy for criminal involvement and taken as the basis for *expected* conviction outcomes, the racial disproportionality in felony convictions for all crimes combined that is "unexplained" by arrests ranges from 25% to 36%.

Unexplained racial disproportionality in felony convictions varies considerably by type of crime. Blacks are *under represented* among those convicted of murder and, by some measures, among those convicted of sex offenses. Blacks are *over represented* among those convicted of drug offenses, weapon offenses and most other crimes.

Unexplained racial disproportionality in felony convictions varies substantially across Florida counties. Among the sixty-two counties where blacks are *over represented* at conviction, the degree of disproportionality ranges from 9% to 451%. The median level of unexplained disproportionality is 51% and for twelve counties it exceeds 100%.

Using arrest as a proxy for criminal involvement and as a basis for estimating *expected* levels of conviction most

likely *underestimates* the degree of unexplained racial disproportionality in conviction.

Black-white differences in socio-economic conditions, prior record and residence in counties with high overall conviction rates, are unrelated to conviction disproportionality and are unlikely sources of explanation for the racial differences observed therein.

3. *Data and Other Information Considered in Forming Opinions*

In forming my opinions, I have considered the following materials:

For most of my analyses the principal data examined are 1998 race-specific *felony convictions* in Florida. These data were compiled from three sources. The first is the Florida Department of Corrections' Offender Based Information System (OBIS) which can produce race specific counts, by crime type and by county, of all felony convictions that resulted in a sentence to prison or to state supervision. Only those offenders who did *not* have adjudication withheld were counted as felony convictions.

To the OBIS counts were added similar totals for felony convictions that resulted in a jail sentence; again *without* adjudication being withheld. Jail sentence data come from two sources: (1) the Computerized Criminal History (CCH) files which are received and maintained by the Florida Department of Law Enforcement, and (2) the Florida Sentencing Guideline Scoresheet, which is received and maintained by the Florida

Department of Corrections. Both are sent to the State from individual courts. Submission rates vary by county and, in some instances, is less than 100%. For each county, we took the larger of the two felony conviction totals from the available sources of jail sentence data (CCH, Guidelines) on the presumption that it was the most complete.

The CCH data include adjudication status — adjudication applied or withheld — and was used for 22 of Florida's 67 counties.[1] For the remaining 45 counties, the Guidelines Scoresheet was used for the felony jail count. Since the Scoresheets do not provide information concerning whether adjudication is withheld, the proportions of blacks and whites with adjudication withheld had to be estimated. For 41 counties, the adjudication rate for the *judicial circuit* in which the county is located was assigned. Circuit rates were calculated by computing the mean of the CCH based rates that were available for the twenty-two counties noted above. When it was not possible to compute such a mean for the judicial circuit, the adjudication rate of an adjacent and demographically similar circuit was assigned. This was done for Palm Beach county. For Hardee, Highlands and Polk counties, the adjacent circuit was considered too dissimilar (urban v. rural); for these I used the mean adjudication rate for the state, based on the twenty-two counties with CCH adjudication data.

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1. These counties are Alachua, Bay, Brevard, Calhoun, Charlotte, Citrus, Clay, Columbia, DeSoto, Franklin, Leon, Levy, Liberty, Madison, Marion, Martin, Okeechobee, Orange, St. Johns, Sarasota, Suwannee and Wakulla.

Felony arrest data were provided by the Florida Department of Law Enforcement. Arrest counts are for crimes matching those specified in the Department of Corrections data base, and are offense and race specific by county. Combined, the data from OBIS, CCH and Guidelines Scoresheets produced the following totals for 1998 felony convictions:

For the analyses that employ arrests as part of the standard for assessing racial disproportionality in convictions, most use arrest and conviction data for calendar year 1998. Because the racial proportions of arrests and convictions are quite stable from year to year, it is not unreasonable to use arrest and conviction data for the same year, despite the obvious time lag that exists between arrest and conviction. As a check for this assumed stability, I replicated a portion of the analysis using 1997 arrests and 1998 convictions, and again, with 1998 arrests, and fiscal year 1998 (July 1, 1998-June 30, 1999) convictions. It will be shown that the choice of time periods or lags has little effect on the results obtained.

Because racial disproportionality varies considerably by type of crime, most of the analysis is done for the nine crime categories used by the Department of Corrections for its reports.[2] In the interest of brevity, and because of data limitations, county level results are shown either for total crime or for the three broad categories of violent, property and drug offenses.

Assessing Racial Disproportionality

To assess racial disproportionality in the likelihood of being convicted as a felon in Florida, I use four different standards for calculating disproportionality. These are well recognized standards used by researchers to assess racial disproportionality in *imprisonment*. Each of these approaches

2. See Appendix A for a complete listing of the specific crimes included in each of the general crime categories.

is described in research that has been published in peer reviewed journals. The first, patterned after Christianson (1980), compares the proportion of convicted felons who are black to the proportion of the Florida population that is black. The second uses the proportion of those arrested who are black, considered a proxy for criminal involvement, as the comparative frame of reference (Blumstein, 1982, 1993). The third uses the proportion of whites who are convicted, given arrest, as the standard for assessing black convictions, given arrest. This method parallels that developed by Langan (1985). The fourth uses the ratio of blacks to whites at the point of arrest as the basis for assessing racial disproportionality at the point of conviction (Crutchfield, et al., 1994). Each methodology using black and white arrest data attempts to estimate the amount of racial disproportionality in convictions that is "unexplained" by racial disparities at arrest.[3]

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3. While there is a substantial research literature concerned with estimating the racial disproportion in imprisonment, I am aware of no study in the past twenty-five years that has had disproportionality in *conviction* as its primary focus. Two studies using 1980 data addressed racial disparity at a number of criminal justice decision points, including conviction and imprisonment. Both used individual case data which are presently unavailable for Florida. Petersilia (1980, 1983) reported that for all crimes combined, equal proportions of blacks and whites who had been arrested in California received "felony convictions." Wilbanks (1987) calculated race specific rates at six decision points for California and nine decision points for Pennsylvania. A black to white ratio, similar to the Crutchfield, et al. (1994) approach described herein, was reported for each decision point. No direct attempt was made to assess "unexplained" disproportionality in convictions, but it is apparent that while varying

(Cont'd)

There are merits to each of the approaches, though the first is probably the weakest because it fails to take even a proxy for criminal involvement into account. The Blumstein approach has the virtue of being the first to systematically take criminal involvement (arrest) into account in assessing the racial disproportionality of imprisonment. It has the disadvantage of being somewhat cumbersome in its application. The Langan approach has the merit of using both putative involvement in crime and the experience of whites as bases for judging disproportionality in the conviction of blacks.

The Crutchfield approach also uses those two standards. It has the added benefit of being straightforward, easy to describe, and employing race-specific rates based on population data which has become the most frequently used approach to the assessment of racial disproportionality. Moreover, a similar method was used by Wilbanks (1987) to argue that the "racial gap" between blacks and whites did *not* consistently increase between arrest and either conviction or incarceration using 1980 data for California and Pennsylvania. In choosing this approach, I engage a methodology that has been used to argue *against* the presumption of "unexplained" racial disproportionality. In its application here, I show that the "racial gap" in Florida

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for specific offenses, the black to white ratios at arrest and conviction were not substantially different. Since 1980, there has been a vast increase in popular and political concern about drugs and weapons related crimes and comparisons of justice outcomes for 1980 and the late 1990s are problematic at best.

does increase, often substantially, between arrest and conviction. Each standard for assessing racial disproportionality is described more fully in the context of the Tables which show the results of their application to Florida data for 1998.

4. *Basis and Reasons for Opinion*

My opinions are based on the following:

RESEARCH FINDINGS

Table 1 (see attached Exhibits) shows the racial disproportionality in felony convictions, using the relative size of the black population as the standard for assessing disproportion. Race specific population estimates for Florida in 1998 are taken from the *Florida Statistical Abstract 1999*, published by the Bureau of Economic and Business Research at the University of Florida. Table 1 compares the percent of Florida's *population* that is black with the percent of Florida's *felony convictions* that involve black offenders for nine categories of crime. The measure of disproportionality (last column) shows how many times higher the proportion of black convictions is than the proportion of the black population in Florida. It is achieved by dividing the second column by the first (convictions / population).

For all crimes combined, blacks in Florida are convicted of felonies 3.5 times as often as their numbers in the population would predict. This over representation is greatest for drug offenses (4.4), robbery (4.3) and weapons offenses

(4.0) and is least for sex offenses (2.0), burglary (2.7), and other crimes (2.6).

If the question is whether blacks are disproportionately represented among felony convictions in Florida, relative to their numbers in the population, the obvious answer is yes. Any policy — such as disenfranchisement — that is predicated on the condition of being convicted of a felony is shown to be clearly disadvantageous to blacks in Florida. However, research concerned with differential criminal justice outcomes customarily asks whether or not those differences can be accounted for by differences in criminal activity. The question posed here, and for the rest of this report, is whether the disproportionality of black felony convictions can be attributed to disproportionate black involvement in crime, and conversely, how much of it is "unexplained" by criminal involvement.

To address this question, I take several approaches that make use of race specific arrest data as a proxy for involvement in criminal behavior. The use of arrest data for this purpose has a long and well established history (Hindelang, 1978) and has been the course chosen by most of those concerned with racial disproportionality in justice outcomes, especially incarceration. While arrest is the most available and widely used proxy for criminal involvement, it should be remembered that arrests are the product of a series of interactions involving victims, the police and suspected offenders and do not precisely reflect criminal activity. Moreover, there is some evidence, which I address in a later section of this report, that using arrests as a proxy

for criminal involvement may overstate the relative level of criminal activity by blacks and thereby understate whatever "unexplained" conviction disparity may be found.

My objective here is to determine how much of the racial disproportionality in convictions is "explained" by differential involvement in crime, as indicated by arrests. To do this, I use three approaches that have been developed in prominent research efforts designed to estimate how much of the racial disproportionality in *imprisonment* can and cannot be accounted for by criminal involvement. For each of these approaches, I apply the precise methodology developed to assess racial disproportionality, substituting conviction for incarceration.

The first of these methodologies was developed by Blumstein (1982, 1993) who computed the "disproportionality explained by crime" as follows:

$$\text{Disproportionality explained by crime} = \frac{\text{ratio of expected black-to-white incarceration rates based only on arrest}}{\text{ratio of black-to-white incarceration rates actually observed}}$$

This approach[4] to the estimation of "explained" and "unexplained" racial disproportionality has also been used by Austin and Allen (2000).

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4. The Blumstein methodology estimates the disproportionality accounted for by arrest using the following formula: 100*(R(100-

(Cont'd)

Table 2 summarizes the results of applying this methodology to Florida arrests and convictions. Using the complete Blumstein formula described in footnote #4, it is possible to compute the disproportionality in conviction explained by criminal involvement (arrest). When this "explained" proportion is subtracted from 100, it provides the percent of racial disproportionality in conviction that is "unexplained" by arrest. The results of this last computation are shown in the final column of Table 2.

Using the Blumstein methodology, 25% of the racial disproportionality in convictions for all crimes combined is not accounted for by racial differences at arrest. Said otherwise, 75% of the racial disparity in convictions can be "explained" by differential involvement in crime as estimated by arrests. It is clear, however, that the "explained" portion of conviction differences varies considerably by the type of crime. The greatest amount of "unexplained" racial disproportionality over representing blacks is found for weapons (39%), drug (38%), and other violent (20%) offenses. The least disproportionality is found for robbery (3%) and burglary (7%). We find also that blacks are actually *under represented* among those convicted for murder, sex offenses, and other crimes, given their criminal involvement as measured by arrests.

(Cont'd)

Q)/(100-R)Q), where Q = actual black percentage incarcerated and R = expected black percentage incarcerated based on arrest which for each crime type is the product of the percent black of arrests and the percent of the prison population associated with that crime type, divided by 100. In my use of this formula, I have substituted *conviction* for Blumstein's use of *incarceration.*

A second approach to assessing "unexplained" racial disproportionality in justice outcomes was developed by Langan (1985) who was concerned with racial patterns of admissions to prison. The basic idea of Langan's approach is to use the rate of white incarceration, given involvement in criminal activity, as the basis for calculating *expected* black incarceration levels. Differences between *expected* and *observed* levels of black incarceration are taken as indicators of the racial disproportionality "unexplained" by criminal involvement.

Unlike Blumstein and others, Langan used race specific rates of victim identified offenders in place of arrest as a proxy for criminal involvement.[5] We use Langan's methodology exactly as developed, substituting arrests for victim identified offenders (unavailable for individual states) and conviction for incarceration.

Table 3 displays the relevant data needed for computing the "unexplained" disproportionality in black convictions using the Langan methodology. Taking drug offenses as an example, we see that there were 50,572 white arrests and 10,605 white convictions, which produces a white conviction rate (convictions / arrests) of .2097 (rounded to .21 in table). Applying that rate to the number of black arrests (.2097 x

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5. The National Crime Victim Survey (NCVS) conducted by the Bureau of Justice Statistics asks victims of crimes to identify the race of the offender if they are able. This is seldom possible for property crimes. Langan did make use of the 5% of property crime victims who did identify race in the national survey he used to include them in his analysis.

50,932) yields an *expected* total — based on the white conviction rate — of 10,680 black convictions. There were actually 17,481 blacks convicted for drug offenses. The difference between the *expected* and *observed* numbers of blacks convicted for drug offenses is 6,801, or 64%.

When this methodology is applied to all crimes combined, it is estimated that blacks are over represented at the point of conviction by 36%. Put otherwise, 36% of the racial disproportionality in Florida convictions during 1968 is "unexplained" by criminal involvement as measured by arrests. As found using the Blumstein method, the Langan approach shows that the "unexplained" disproportionality over representing blacks is greatest for weapons (67%), drugs (64%), and other violent (27%) crimes. It is least for robbery (6%) and burglary (10%). Again, for murder, sex offenses, and other crimes, blacks are under represented among those convicted.

The third approach I took to estimating the "unexplained" racial disparity in conviction uses a methodology that is most prominently associated with Crutchfield and has been the most frequently used by those estimating racial disparity in imprisonment (Bridges, et al., 1995; Crutchfield, et al., 1994; Bridges and Crutchfield, 1988; Myers and Sabol, 1987; Wilbanks, 1987). It is also the most straightforward. Using arrest as a proxy for criminal involvement, this approach compares the black/white ratio at the point of arrest with the black/white ratio at the point of conviction. The difference is taken to represent the percent of conviction disparity that is "unexplained" by black and white differences in criminal involvement.

Table 4 shows the ratio of black to white arrest rates for felonies in Florida during 1998, the ratio of black/white felony conviction rates and the percent difference, or disproportionality "unexplained." Arrest rates and conviction rates are determined by dividing race specific arrest or conviction totals by the number of blacks or whites in the Florida population (black arrests / black population; white arrests / white population) etc. In Table 4 we can see that the black arrest rate for murder is six times higher than that for whites, but the conviction rate is only 4.7 times greater. Thus, given criminal involvement as indicated by arrest, and when compared directly to whites, blacks are, by this measure, under represented among those convicted for murder.

However, for all crimes combined, Table 4 shows the disproportionality in conviction that is "unexplained" by criminal involvement using the Crutchfield methodology is 35%. As with the Blumstein and Langan approaches, this method shows that "unexplained" racial disproportionality over representing blacks is again highest for weapons (67%), drug (64%) and other violent (29%) offenses; and lowest for robbery (7%) and burglary (9%). These results again show that for murder, sex offenses, and other crimes, blacks are not over represented at conviction.

To this point, I have shown that the racial disproportionality in convictions that is "unexplained" by criminal involvement (arrests) is, for all crimes combined, between 25% and 36%, depending on the methodology used. I have also shown that this disproportionality varies substantially by type of crime. Over representation of blacks

is consistently highest for weapons, drugs and other violent crimes, which comprise 59% of all black convictions, and it is consistently lowest for robbery and burglary. I have also shown that blacks are consistently under represented among those convicted of murder, sex offenses and other crimes.

The consistency of these results, given the diversity of methodologies involved, suggests a degree of reliability in the findings that clearly warrants the conclusion that blacks are disadvantaged at the point of felony conviction, at a level that is not fully "explained" by differential criminal involvement, and in a manner that varies considerably by type of crime.

Variation of Conviction Disproportionality Across Counties

An important contribution to the study of racial disproportionality in imprisonment has been the finding that different geographical units (usually states) have widely disparate rates of "unexplained" disproportionality (Bridges and Crutchfield, 1988; Crutchfield, et al., 1994; Hawkins and Hardy, 1989; Sabol, 1989). Using this insight, I applied the method used in Table 4 to compute the ratio of black to white arrest and conviction rates for the 67 Florida counties in 1998. Again, the difference between the ratio of black/white arrest and conviction rates is taken as a measure of the "unexplained" racial disproportionality in felony convictions.

Table 5 shows the ratio of black/white arrest rates, the ratio of black/white conviction rates, and the percent difference for all crimes combined and for individual

counties. The counties are displayed in order of *increasing* "unexplained" disproportionality. Five counties have negative or zero disproportionality, indicating there is no black disadvantage in convictions beyond what is accounted for by arrests as a proxy for criminal involvement. The range of "unexplained" disproportionality in convictions is from 9% (DeSoto) to 451% (Santa Rosa). The median level of "unexplained" disproportionality is 51%. This means that half of Florida's 67 counties have a level of racial disproportionality in conviction that is at least 51% higher than what would be accounted for by race differences at arrest. Twelve counties have a conviction disproportionality that is at least 100% greater than what arrest differences by race would predict.

Table 6 repeats the county-level estimates of "unexplained" disproportionality for three broad crime categories — drugs, violent and property. The counties are displayed in order of *increasing* conviction disproportionality for drug crimes. It is not possible to examine the nine crime types previously considered because for many small counties the numbers of arrests and convictions were too low or non-existent for meaningful analysis. Also, because the numbers of felons sentenced to jail is quite small in a number of counties and the proportion "adjudicated" among those sentenced to jail is estimated for some counties, it was determined that the calculation of felony convictions with adjudication applied for specific crimes and counties was not a reliable undertaking at the jail level. For this analysis then, we consider only those convicted felons sentenced to prison or state supervision. These comprise 69% of our conviction population.

	Black	White	Other	Total
Sentenced to Prison	12,309	10,446	328	23,083
Sentenced to Supervision	14,126	20,198	491	34,815
Sentenced to Jail	14,185	11,843	148	26,176
Total	40,620	42,487	967	84,074

Table 6 shows that the percent of disproportionality "unexplained" by arrests varies substantially not only by county, but by crime type as well — often within the same county. For example, in Walton county, blacks are convicted of violent crimes 139% less often than might be expected by race differences in arrest rates. But for drug crimes in the same county, blacks are convicted at a level that is 289% higher than would be expected by black/white arrest rates. Not surprisingly, the "unexplained" racial disproportionality is greatest for drug crimes in all but seven counties where comparison with violent and property crimes can be made. Nineteen counties have a racial disproportionality in drug convictions that is at least 200% higher than would be expected by racial differences in arrest rates. Conversely, seventeen counties have black/white conviction ratios for violent crime that under represent blacks in relation to what arrest ratios would predict.

In sum, there is extraordinary variation between and within counties in the amount of "unexplained" racial disproportionality that exists at the point of conviction. It is difficult to imagine a scenario in which the characteristics of offenders themselves would be so variable as to account for differences of this magnitude between counties and between crimes within counties.

Alternative Timing of Arrest and Conviction Measures

Before addressing the question of whether arrests *overstate* black involvement in crime and thereby *understate* the degree of "unexplained" racial disproportionality in conviction that has been described, I will first raise a

methodological question concerning the use of 1998 arrests and convictions in the analyses just presented. There is obviously a lag between arrest and conviction that may vary by jurisdiction and by crime seriousness, among other things. An issue in research that uses aggregate as opposed to individual case data is how best to account for this lag. I have chosen to use 1998 arrests and convictions even though some 1998 convictions will be the consequence of 1997 arrests and some 1998 arrests will not be resolved until 1999. Given the substantial stability in the relative proportions of blacks and whites in both arrests and convictions over time, this is not likely a problem. However, to test for the possibility that our results may be an artifact of using the same calendar year for both arrests and convictions, I have done the analysis using two alternative time formats.

Table 7 reproduces the results from Table 4, using the ratio of black/white arrest rates for 1997 and the ratio of black/white conviction rates for 1998. Obviously, some 1997 arrests will have been resolved in 1997 and some 1998 convictions will be the result of 1998 arrests. Any choice of dates has some variant of this problem. With convictions lagged by one year, the "unexplained" racial disproportionality for all crimes is slightly higher (38%) than was found using 1998 data for both arrests and convictions (35%). Similar minimal differences between the two approaches are found for the separate crime categories. However, the results were identical for sex offenses, theft and other violent and weapons offenses. Using 1997-1998 data, "unexplained" disproportionality was slightly higher for drug offenses, and slightly lower for murder, robbery, burglary and other crimes.

Under both conditions, the greatest conviction disproportionality over representing blacks is found for drugs, weapons, and other violent crimes and the smallest disproportionality for murder, sex offenses, robbery, and other crimes. The largest differences between the two approaches are produced for murder and robbery. These crime types have the smallest numbers of individuals involved, and percentages computed for them are more easily changed by the small differences produced using the two dating strategies.

Table 8 also reproduces the results from Table 4, this time using arrests from calendar year 1998 and convictions from fiscal year 1998/99. This means the arrests covered January 1998 through December 1998 and convictions from July of 1998 through June of 1999. Again, the differences between this approach and that relying on calendar year 1998 for both arrests and convictions are minimal. For all crimes combined, the "unexplained" disproportionality was 33% using fiscal year convictions compared to 35% with calendar year. Again, weapons, drugs, and other violent crimes show the greatest levels of "unexplained" disproportionality over representing blacks and murder, sex offenses, robbery, and other crimes show the least.

The bottom line in this regard is that no matter which time frame is chosen, the results are essentially the same. "Unexplained" racial disproportionality in convictions is found at a level of one-third or higher for all crimes combined. Regardless of which approach is taken, the highest levels of disproportionality over representing blacks and the

lowest levels of disproportionality are found for the same crimes types. When combined with the consistency of results found using several different methodologies to estimate disproportionality in felony convictions "unexplained" by racial disparities in arrest, these results underscore the reliability and robustness of our basic findings.

Using Arrest as the Measure of Criminal Involvement

In this report I have taken what could be described as a conservative approach to the estimation of "unexplained" disproportionality. It is an approach that likely *understates* the true level of disproportionality unexplained by criminal activity. While I have used well established and diverse methodologies, developed by respected scholars concerned with similar questions dealing with imprisonment instead of conviction, the use of arrests as a proxy for criminal activity clearly overstates the relative involvement of blacks in crime.

Consider the disparate estimates of black involvement in criminal activity that are presented in **Table 9**. These are national (not Florida) data for 1997. For rape, robbery, and both aggravated and simple assault, the percent of "offenders" who are presumed to be black is taken from the 1997 National Crime Victimization Survey (U.S. Department of Justice, 2000). These survey results are not available for individual states. As noted above, that survey asks victims of crime if they can identify the race of the person who victimized them. So, for example, Table 9 reports that 21% of rape victims identified the race of their assailant as black; 43% of robbery victims did the same. Though a less than perfect measure of

racial involvement in offending,[6] victim reports are closer to the criminal event than are arrests and, as noted above, NCVS figures have been used previously as a proxy for criminal involvement in the assessment of racial disproportionality in imprisonment (Langan, 1984). The estimate of black drug offending comes from the well established National Household Survey on Drug Abuse.[7] That survey asks respondents about their use of specific illegal drugs in the past year. It also asks whether the respondent has used "any" illicit drugs in the past year. Responses to the latter question are reflected in Table 9.

The second column in Table 9 shows the proportion of those arrested in 1997 who were black. Again, these are national level data reported to the F.B.I. through the Uniform Crime Reporting program. Comparing black arrest proportions with victim or self identified (drugs) black offending proportions indicates the extent to which arrests

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6. Victim surveys do not address white collar crimes that typically have a higher proportion of white offenders than is found for the "street crimes" that victim surveys do address. In addition, victims may not know the race of the offender, but could nevertheless make a designation. Alternatively, they could deliberately lie and identify the wrong race. It is impossible to determine whether either of these possibilities "should" lead to more blacks or whites being identified. But, it is important to remember that whites are typically at least 80% of those victimized in what victim surveys call "personal crimes" and it is difficult to imagine how this would result in an *underestimate* of black involvement in criminal activity.

7. The proportion of admitted drug users (not dealers or traffickers) who are black is only slightly higher than the proportion of blacks in the population.

as a proxy for criminal involvement may overstate that reality for blacks. The difference in the percent of black offenders identified by victims and blacks arrested is substantial for each crime. Excluding drugs, the average increase from offending to arrest is 56%. This is, necessarily, an imprecise measure. But it suggests that if offending levels for blacks are closer to those identified by victims, then the "unexplained" racial disparity in felony convictions described earlier is likely an underestimate.

To illustrate how much the "unexplained" racial disproportionality in convictions may be underestimated using arrest as a proxy for criminal involvement, I have recalculated several of the values in Table 4, using victim identified offenders in place of arrest.[8] For robbery, the "unexplained" disproportionality increases from 7% using arrests to 48% using victim identified offenders. For sex offenses, the increase is from 0% to 39% and for other violent crimes it is from 29% to 106%.[9] Thus, it is not unreasonable to assume that levels of "unexplained" racial

8. This same procedure was used by Austin and Allen (2000) in their study of the racial disproportionality in imprisonment. This illustration must assume that the race proportions in offending as identified by victims in a national survey, would apply as well to Florida if such survey results were available at the state level.

9. The estimate for robbery is unambiguous and straightforward. Those for sex offenses and for other violent crimes, though illustrative, should be regarded as rough approximations. This is because the victim survey asks specifically about sexual assault in the first instance and aggravated assault in the second, while the corresponding conviction data, though primarily capturing these assaults necessarily includes some other related offenses.

disproportionality described herein, that are based on the use of arrest as a proxy for criminal involvement, underestimate the true disproportionality, perhaps substantially, for some crimes.

Alternative Approaches to the Interpretation of Conviction Disproportionality

Here, I address several possible approaches that might be taken to account for the "unexplained" racial disproportionality described in the foregoing analyses. I am particularly interested in explanations that would account for that disproportionality in ways that mitigate the apparent relevance of race *per se*. The approaches taken here parallel those developed by Blumstein (1982) and by Austin and |Allen (2000) in their discussion of "unexplained" racial disproportionality in imprisonment.

First, it is possible that the apparent disadvantage of blacks at the point of conviction is really a socio-economic disadvantage, which affects whites and blacks alike but is experienced by a higher proportion of African Americans. Second, it may be the case that blacks in Florida are disproportionately convicted because they more often live in places with higher overall rates of conviction for whites and blacks alike. If a higher proportion of blacks lived in places with higher conviction rates, they would be disproportionately convicted simply as a matter of geographical fact. Third, it is possible that blacks in Florida have more substantial criminal records which, if they took the stand at trial, could influence the judgement to convict.

The first two possibilities are addressed in **Table 10**. There, I show the results of product-moment (Pearson *r*) correlations between levels of "unexplained" racial disproportionality for Florida counties (Table 5) and measures of socio-economic disadvantage as well as overall rates of conviction for those counties. The estimates of socio-economic disadvantage are computed from data provided in the *Florida Statistical Abstract 1999*, published by the Bureau of Economic and Business Research at the University of Florida. Because the estimates of racial disproportionality in conviction are based on black/white ratios of arrest and conviction, I have similarly computed black/white ratios for poverty, unemployment and white/black ratios for *per capita* income and high school graduation.[10] Conviction rates for individual counties are computed two ways. The first is a *per capita* rate, based on county population, and the second considers convictions as a proportion of arrests. Both are for blacks and whites combined.

If the "unexplained" racial disproportionality in Florida convictions is at least partially attributable to blacks being more socio-economically disadvantaged or more often living in places with higher overall conviction rates, we would expect the correlations in Table 10 to be positive, strong and statistically significant.[11] Instead, three of the four socio-

10. White/black ratios are used for income and graduation to reflect black disadvantage.

11. These are product-moment (Pearson *r*) correlations. A positive value means that as measures of socio-economic disadvantage or conviction rates increase, so too do measures of "unexplained" racial disproportionality. These values may range from -1.0 to +1.0.

economic measures show a negative[12] relationship with "unexplained" racial disproportionality, and that which is positive is scarcely above zero. The relationship between overall conviction rates and "unexplained" disproportionality, while positive, is quite weak. None of the correlations reported in Table 10 is statistically significant. What these data clearly suggest is that the "unexplained" racial disproportionality in Florida convictions cannot be accounted for by racial differences in socio-economic circumstances nor by the geographic pattern of overall conviction rates.

The issue of racial difference in prior record is addressed by use of data for "prior sentencing events" and "prior convicted charges" for blacks and whites convicted of felonies and sentenced to prison or state supervision in Florida during 1998. These data were provided for each of the nine crime categories used throughout this report.[13] The mean values for blacks and whites and detailed data definitions for both prior record measures are described in Appendix B. For both prior sentencing events and prior convicted charges, blacks are higher than whites in each crime category. This is not surprising in light of the evidence provided above concerning the racial disproportionality in felony convictions (Tables 2-6).

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12. A negative relationship means that the two measures being correlated move in opposite directions. For example, as one increases, the other decreases.

13. These data were prepared by the Florida Department of Corrections, Bureau of Research and Data Analysis, and do not include felons sentenced to jail in 1998.

The question raised here is whether the pattern of racial disparity in prior record is consistent with or related to the pattern of racial disproportionality in convictions described previously. To assess that question, we have computed rank-order correlations (Spearman's rho) between the *percent* of "unexplained" racial disproportionality in convictions (Table 4) and two measures of racial disparity in prior record: (1) the percentage by which the mean number of *prior sentencing events* for blacks exceeds that for whites; (2) the percentage by which the mean number of *prior convicted charges* for blacks exceeds that for whites.

Because the only prior record data currently available are for the nine crime types using convictions for the entire state, my analysis uses the nine crime types as the basis of rank-ordering. In effect, I am asking whether the crimes for which the "unexplained" racial disproportionality in convictions are highest are also the crimes for which the racial disparity in prior record is highest. To do this a correlation is computed between the ranking of crime types on one measure ("unexplained" conviction disproportionality) and the ranking of crime types on another (racial disparity in prior record).

Table 11 ranks the nine crime types (1 = highest) first in terms of "unexplained" racial disproportionality in conviction based on results described in Table 4 and then in terms of the two measures of racial disparity in prior record noted above. We can see, for example, that weapons offenses rank first in terms of "unexplained" conviction disproportionality, but rank ninth and ninth respectively, in terms of racial

disparity in prior record. At the other end of the rankings, murder ranks ninth in conviction disproportionality but first and second on the two measures of prior record disparity.

The correlation between the rank ordering of crimes on the several measures are presented at the bottom of Table 11. To simplify discussion, "unexplained" disproportionality is designated as "U" and the measures of racial disparity in prior record are designated as "A" and "B," as indicated by the notation at the top of each column of rankings. Thus, the rank order correlation between "unexplained" conviction disproportionality (U) and the percent difference in mean prior sentencing events for blacks and whites (A) will be referred to as U-A. If prior record disparities have the potential to help account for conviction disproportionalities, there should be strong positive correlations for U-A, and U-B.

In fact, as Table 11 shows, each of those correlations is negative, meaning that as prior record disparity between races *decreases*, racial disproportionality in convictions *increases*. Moreover, for both measures, U-A (-.38), U-C (-.48) the negative correlations are relatively strong. There is nothing in these data to suggest that the levels of racial disproportionality in conviction described previously can be attributed to racial differences in prior record.

In sum, the levels of "unexplained" disproportionality documented in this report are apparently not related to racial differences in socio-economic conditions, residence in counties with high conviction rates, nor prior record. These

three factors have been suggested as possible contributors to observed differences in black and white incarceration rates (Blumstein, 1982; Austin and Allen, 2000). Though plausibly related to *sentencing* outcomes that could lead to incarceration there is nothing in the analyses conducted by Blumstein (1982) and by Austin and Allen (2000) that actually demonstrates their relevance for observed incarceration disparities. As well, the present data suggest that whatever their plausible relevance for convictions these factors have either a negligible or negative relationship to "unexplained" conviction disproportionality and are unlikely candidates to account for the observed differences between blacks and whites.

North Florida and the Concentration of Conviction Disproportionality

Finally, there is a pattern to the distribution of "unexplained" racial disproportionality throughout Florida that is worth noting and may provide some insight into the observed differences in conviction. Specifically, this disproportionality is consistently higher in north Florida than elsewhere in the state. **Table 12** shows the median[14] levels of "unexplained" disproportionality that are found in north

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14. Medians are such that half of the counties have higher, and half have a lower value of conviction disproportionality. They are better than means for this comparison because means and observed differences between means can be inflated by extreme values or "outliers."

Florida[15] counties and in the state's other counties. For violent crimes, the "unexplained" disproportionality in felony convictions is 23% higher in north Florida than elsewhere in the state. For drugs, this difference is 87% and for property crimes, it is almost 200%. Since property and drug crimes account for 66% of all convictions and 69% of black convictions, these indicators of regional variation suggest differences in conviction disproportionality that are both real and substantial.

It is beyond the scope of this report to interpret or explain these regional differences. My principal point is to show that racial disproportionality in felony convictions not only exists in Florida, but that it varies considerably by county. Moreover, while conviction disproportionality is clearly an issue in all regions of Florida, it appears to have a pattern of heightened concentration in that part of Florida that is most closely associated with the culture, economy and politics of the "old South" (Tebeau, 1971).

Table 13 offers brief insight into some of the socio-demographic characteristics that currently distinguish north Florida from the rest of the state. These data are obtained from the *Florida Statistical Abstract 1999*, published by the Bureau of Economic and Business Research at the University

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15. The counties designated as "north Florida" include: Alachua, Baker, Bay, Bradford, Calhoun, Clay, Columbia, Dixie, Duval, Escambia, Flagler, Franklin, Gadsden, Gilchrist, Gulf, Hamilton, Holmes, Jackson, Jefferson, Lafayette, Leon, Levy, Liberty, Madison, Nassau, Okaloosa, Putnam, St. Johns, Santa Rosa, Suwannee, Taylor, Union, Wakulla, Walton, Washington.

of Florida. They show that in comparison with the rest of the state, north Florida counties have a smaller and more rural (less densely populated) population that is younger and contains a higher proportion of blacks. It is also apparent that residents of north Florida counties are poorer overall. However, the relative poverty of north Florida is more pronounced for whites than for blacks.

Whether rural, relatively impoverished whites are more "threatened" by the presence of larger numbers of blacks is something the present data cannot address. But there is a substantial research literature suggesting that various means of social control, including executions, incarceration, arrests, and police department funding may be more frequently mobilized under conditions such as those described for north Florida.[16] The potential for that mobilization to adversely impact African Americans has been one implication of that body of research.

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16. See Blalock, 1967 for an introduction to this issue and Liska, 1992 and Tolnay, et al., 1992 for more current discussions of research examining race, "social threat" and social control.

5. *Exhibits*

Attached are tables 1-13 which summarize the bases and support for my opinions.

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6. *Compensation*

I am being compensated at a rate of $100 per hour for my pre-trial work in connection with this litigation and $200 per hour for my in court time.

7. *Other Expert Testimony Given in Last Four Years*

None

Date: June 21, 2001

_____/s_____
Theodore Chiricos

Notes and Data Qualifications:

1998 Prison and Supervision Admissions Included and Not Included in These Figures:

1. Only sentences that occurred in Florida are included. Offenders sentenced in other states who are serving time in Florida prisons or under supervision in Florida are *not* included.

2. Pretrial Intervention cases are *not* included (no prosecution or conviction occurs in these cases). Prosecution is withheld and the case is nolle prossed if the offender successfully completes a term of supervision.

3. If all the conviction charges in the sentencing event had adjudication withheld, the admission was *not* included.

4. If all the convictions in the sentencing event were for misdemeanors the admission was *not* included (i.e., only felony convictions were included).

5. If the supervision admission was the result of "split sentence" in which the offender was sentenced to a term of prison followed by a term of supervision, the case was *not* included.

6. If the supervision admission involved a "post-prison" supervision term it was *not* included. These are offenders who were sentenced to prison and are statutorily required to serve a supervision term equal to the amount of time their prison sentence was reduced as a result of gain time earned while in prison.

Prior Sentencing Events Were Definied as Follows:

1. Only Felony convictions, were included (i.e., Misdemeanors convictions were excluded);

2. Does *not* include felony sentences that resulted in a local jail sentence Florida (data not available on Department of Correction's database).

3. Does *not* include felony sentences that occurred outside of Florida (data not available on Department of Correction's database).

4. Includes only sentencing events recorded on the Florida Department of Correction's database. All prior commitments to the department are *not* counted for admissions in 1998. The reason for this is as follows. The department's database was developed in the late 1970's. Data relating to offenders under the department's jurisdiction at that time was entered. Only in some cases were prior sentences that resulted in a prison or supervision sentence for those offenders were also entered into the database. Each time an offender enters prison

or supervisio ney retain the same inmate identifier and a sequential counter of the number of supervision and prison sentences. There are numerous cases in which offenders have a sequential number that indicates they have been to prison one or more times, however, there is no data on these prior sentences. These sentences are not counted in these figures because there is no information about these events.

Prepared By:
Florida Department of Corrections
Bureau of Research and Data Analysis
May 25, 2001

Notes and Data Qualifications:

Convicted charges include offenses in which adjudication was withheld or not withheld. Also, convicted charges that had the same offense date but were included in multiple sentencing events were counted one time. For example, if an offender convicted of burglary and placed on supervision and then was re-sentenced on the same burglary to a new term of supervision, resulting from a revocation of the original supervision term, only the first burglary conviction was counted.

1998 Prison and Supervision Admissions Included and Not Included in These Figures:

1. Only sentences that occur in Florida are included. Offenders sentenced in other states who are serving time in Florida prisons or under supervision in Florida are *not* included.

2. Pretrial Intervention cases are *not* included (no prosecution or conviction occurs in these cases). Prosecution is withheld and the case is nolle prossed if the offender successfully completes a term of supervision.

3. If all the conviction charges in the sentencing event had adjudication withheld, the admission *not* included.

Appendix B

Means and Standard Deviations of the Number *Prior Sentencing Events*
By Race and Primary Offense:
Offenders Sentenced to State Prison or Supervision in 1998
(See Explanatory Notes and Data Qualifications Below)

Primary Offense	White: Mean	White: Standard Deviation	Black: Mean	Black: Standard Deviation
Murder/Manslaughter	.72	1.25	1.13	1.53
Sex Offenses	1.06	1.42	1.63	1.80
Robbery	1.48	1.80	1.77	2.04
Other Violent Offenses	1.41	1.69	1.95	2.00
Burglary	1.79	1.95	2.59	2.46
Theft, Forgery, Fraud	2.05	2.15	2.71	2.51
Drug Offenses	1.95	1.99	2.83	2.48
Weapon Offenses	2.05	1.96	2.39	2.03
Other	1.76	1.99	2.28	2.18

Appendix B

Means and Standard Deviations of the Number *Prior Convicted Charges*
By Race and Primary Offense:
Offenders Sentenced to State Prison or Supervision in 1998
(See Explanatory Notes and Data Qualifications Below)

Primary Offense	White: Mean	White: Standard Deviation	Black: Mean	Black: Standard Deviation
Murder/Manslaughter	1.21	4.08	1.81	3.67
Sex Offenses	1.38	2.34	2.22	2.80
Robbery	2.35	3.57	2.76	3.88
Other Violent Offenses	2.14	3.21	3.05	3.78
Burglary	3.58	5.08	4.46	4.87
Theft, Forgery, Fraud	4.34	6.66	4.93	5.83
Drug Offenses	3.35	4.71	4.51	4.49
Weapon Offenses	3.59	4.53	3.86	4.17
Other	3.27	4.75	4.15	4.60

4. Includes only sentencing events recorded on the Florida Department of Correction's database. All prior commitments to the department are *not* counted for admissions in 1998. The reason for this is as follows. The department's database was developed in the late 1970's. Data relating to offenders under the department's jurisdiction at that time was entered. Only in some cases were prior sentences that resulted in a prison or supervision sentence for those offenders were also entered into the database. Each time an offender enters prison or supervision, they retain the same inmate identifier and a sequential counter of the number of supervision and prison sentences. There are numerous cases in which offenders have a sequential number that indicates they have been to prison one or more times, however, there is no data on these prior sentences. These sentences are not counted in these figures because there is no information about these events.

Prepared By:
Florida Department of Corrections
Bureau of Research and Data Analysis
May 25, 2001

Table 9. Percent Difference from Offending to Arrest in the U.S.

Crime Type	Percent of Total that is Black: Offenders 1997[a]	Arrestees 1997[b]	Percent Difference: Offenders→Arrest
Rape/Sexual Assault	21	40	+90
Robbery	43	57	+33
Aggravated Assault	24	37	+54
Simple Assault	24	35	+46
Drugs[d]	15	37	+147

[a] Sources: U.S. Department of Justice, Bureau of Justice Statistics, *Criminal Victimization in the United States, 1997*, NCJ-174446 (Washington, DC: U.S. Department of Justice, 2000), Table 40. U.S. Department of Health and Human Services, Substance Abuse and Mental Health Services Administration (SAMHSA), *National Household Survey on Drug Abuse: Summary Findings 1998* (Washington, DC, 1999), p. 13.

[b] Source: U.S. Department of Justice, Federal Bureau of Investigation, *Crime in the United States, 1997* (Washington, DC: USGPO, 1998), pp. 240-242.

[a] Aggregated dated for rape/sexual assault vary considerably by data source. Within the category of rape/sexual assault, the NCVS (offender data) includes verbal threats of rape and threats of sexual assault. The UCR (arrest data) includes only the charge of forcible rape.

[d] Percent of drug users that are black (use in past year) for specific drug types:

marijuana	15
cocaine	13
crack	34
inhalants	4
hallucinogens	3
stimulants	10
sedatives	18
tranquilizers	8
LSD	2
heroin	2

SUPPLEMENT TO EXPERT REPORT BY CHRISTOPHER UGGEN, PH.D., DATED OCTOBER 17, 2001

MEMO: Race and Automatic Restoration of Civil Rights (ARCR) in Florida

Prepared by Christopher Uggen with the assistance of Melissa Thompson

This memorandum is a supplement to my main expert report, a portion of which analyzed a sample of case files obtained from the Florida Office of Executive Clemency.

Automatic Restoration and the Expert Report

Based on our conversations with Janet Keels of the Florida Office of Executive Clemency, we know that most of the files examined in our sample of cases from Florida's Office of Executive Clemency concerned applicants who were either ineligible or unsuccessful in applying for Automatic Restoration of Civil Rights (ARCR). Consequently, many felons whose rights were restored through the "automatic" restoration process are not represented in our analysis of Executive Clemency in Florida. To fill this gap in the expert report, this memo addresses race differences in eligibility for the automatic restoration process and the reasons for ineligibility for recent years.

The analysis in this report is based on documents received from Florida's Office of the Governor and Office of Executive Clemency in response to plaintiffs' interrogatories. These include an interrogatory requesting all documents

regarding rule 9A, restoration without a hearing, which asked for all documents regarding the number, race, and sex of individuals convicted of a crime who are eligible for restoration, who have applied for restoration, who have received restoration, who have been denied restoration, and who have been determined ineligible for restoration under rule 9A for the period 1/1/1960 through the present. The documents, "Restoration of Civil Rights Granted Without Hearing 1998, 1999, and 2000," Bates number EOG00359, and "Florida Parole Commission: Year 2000 Restoration of Civil Rights Without a Hearing," Bates number OEC-W02048, provide some important information for recent years (1998-2000), although they do not provide a complete picture of the automated restoration procedure over the entire period nor do they provide detailed subgroup breakdowns at each stage of the procedure. To supplement these data, I also draw on additional materials noted in the expert report.

Race Differences in ARCR Eligibility for the Year 2000

In the year 2000 (the year for which we have the most detailed data), Florida's Office of Executive Clemency reviewed 9,750 cases for ARCR eligibility, as shown in Table 1. As we discuss below, not every felon released from supervision is reviewed for eligibility for restoration of civil rights. According to the Rules of Executive Clemency, this review of the felon's civil rights status takes place "after completing and satisfying all sentences and all conditions of supervision," if the individual meets certain requirements. Of those, 2,056 (or 21.1 percent) were found to be eligible for ARCR and 7,694 (78.9 percent) were

Table 2. Racial Disproportionality of 1998 Felony Convictions in Florida, Using Arrests and the Blumstein (1993) Methodology for Computing Expected Levels of Conviction

	Convictions			Arrests			Black Percentage		Percent
Crime Type	black	white	total*	black	white	total	Convictions (Actual)	Arrests[b] (Expected)	Disproportionality Unexplained
Murder	532	688	1,245	1,242	1,249	2,501	42.7	49.7	-32
Sex Offenses	797	1,945	2,790	2,063	4,988	7,064	28.6	29.2	-3
Robbery	2,093	1,322	3,462	5,868	3,942	9,828	60.5	59.7	3
Other Violent	4,789	5,933	10,876	55,241	87,119	142,664	44.0	38.7	20
Burglary	3,704	5,989	9,880	16,117	28,751	44,951	37.5	35.9	7
Theft	6,963	10,089	17,249	34,720	57,584	92,481	40.4	37.5	11
Drug Offenses	17,481	10,605	28,270	50,932	50,572	101,612	61.8	50.1	38
Weapon Offenses	1,549	1,166	2,743	3,204	4,035	7,255	56.5	44.2	39
Other	2,712	4,750	7,359	13,347	21,918	35,338	35.9	37.8	-8
total	40,620	42,487	84,074	182,734	260,158	443,694	48.3	41.2	25

*Totals for convictions and arrests are greater than the sum of black/white convictions/arrests because offenders of "other" race are included.

[b]Differences between actual (observed) and expected convictions are statistically significant for all crime types.

Table 3. Racial Disproportionality of 1998 Felony Convictions in Florida, Using Black and White Arrests and the Langan (1985) Methodology for Computing Expected Levels of Conviction

Crime Type	White Arrests	White Convictions	White Probability Of Conviction[1]	Black Arrests	Expected Black Convictions[a]	Observed Black Convictions	Percent Disproportionality Unexplained
Murder	1,249	688	0.55	1,242	684	532	-22
Sex Offenses	4,988	1,945	0.39	2,063	804	797	-1
Robbery	3,942	1,322	0.34	5,868	1,968	2,093	+6
Other Violent	87,119	5,933	0.07	55,241	3,762	4,789	+27
Burglary	28,751	5,989	0.21	16,117	3,357	3,704	+10
Theft	57,584	10,089	0.18	34,720	6,083	6,963	+15
Drug Offenses	50,572	10,605	0.21	50,932	10,680	17,481	+64
Weapon Offenses	4,035	1,166	0.29	3,204	926	1,549	+67
Other	21,918	4,750	0.22	13,347	2,893	2,712	-6
Total	260,158	42,487	0.16	182,734	29,843	40,620	+36

[a] Differences between actual (observed) and expected convictions are statistically significant for all crime types except sex offenses.

[1] Values in this column are "rounded off" for White Convictions/White Arrests. The exact values for the rates, rather than the "rounded off" values entered in the "Probability" column, are the values applied to obtain the values in the column "Expected Black Convictions."

Table 4. Racial Disproportionality of 1998 Felony Convictions in Florida Using Black and White Arrests and the Crutchfield, et al., (1994) Methodology for Computing Expected Levels of Conviction

Crime Type	B/W Ratio of Race-Specific Rates		Percent Disproportionality Unexplained[a]
	Arrest 98	Conviction 98	
Murder	6.0	4.7	-22
Sex Offenses	2.5	2.5	0
Robbery	9.0	9.6	+7
Other Violent	3.8	4.9	+29
Burglary	3.4	3.7	+9
Theft	3.7	4.2	+14
Drug Offenses	6.1	10.0	+64
Weapon Offenses	4.8	8.0	+67
Other	3.7	3.5	-5
Total	4.3	5.8	+35

[a] Differences between actual (observed) and expected convictions are statistically significant for all crime types except sex offenses.

of those classified as ineligible for the automatic restoration process were ineligible for more than one reason: over 55 percent of ineligibilities resulted from a failure to meet two or more conditions. Of the 3,004 people disqualified for a single reason, over 82 percent either had more than two felony convictions (47.5 percent) or had been convicted of various disqualifying offenses (34.9 percent).

(Cont'd)

following requirements must be met to be eligible for restoration of civil rights without a hearing: 1. No outstanding detainers or pending criminal charges (7 disqualified in 2000 based solely on this requirement); 2. No outstanding pecuniary penalties or liabilities that total more than $1,000 and result from a criminal conviction or traffic infraction (231 disqualified); 3. No outstanding pecuniary penalties or liabilities if such penalties or liabilities are attributed to victim restitution (128 disqualified); 4. No conviction for a capital or life felony (1 disqualified); 5. No previous Clemency Board action (90 disqualified); 6. No more than two felony convictions of record (1,428 disqualified); 7. No felony conviction involving various disqualifying offenses (1,049 disqualified); 8. Must be a citizen of the U.S. if requesting RCR (13 disqualified); 9. If convicted in court other than Florida, individual must be a legal resident of Florida if requesting RCR (6 disqualified); 10. Individual must be domiciled in Florida, if requesting Restoration of Alien Status Under Florida Law (0 disqualified in 2000). These rules were amended again, effective June 14, 2001, removing the $1000 pecuniary penalty exclusion for cases not involving restitution to victims, replacing the disqualification for any prior clemency board action to no prior action within the past 10 years, and altering the list of disqualifying offenses and offender categories. All of the cases examined in this report for the years 1998-2000 fall under the rules existing prior to the 2001 amendments.

Table 1. Race and Sex of ARCR Applicants in 2000, by Eligibility Status.

	Total Reviewed Files		Eligible Files			Ineligible Files		
Race/Sex	Number	%	Number	% of Total Eligible[1]	% of Group Determined Eligible[2]	Number	% of Total Ineligible[3]	% of Group Determined Ineligible[4]
White Males	4,586	47.0%	1,165	56.7%	25.4%	3,421	44.5%	74.6%
Af.Am. Males	3,637	37.3%	470	22.9%	12.9%	3,167	41.2%	87.1%
White Females	769	7.9%	247	12.0%	32.1%	522	6.8%	67.9%
Af.Am. Females	585	6.0%	130	6.3%	22.2%	455	5.9%	77.8%
Other Males	143	1.5%	38	1.8%	26.6%	105	1.4%	73.4%
Other Females	30	0.3%	6	0.3%	20.0%	24	0.3%	80.0%
Total Males	8,366	85.8%	1,673	81.4%	20.0%	6,693	87.0%	80.0%
Total Females	1,384	14.2%	383	18.6%	27.7%	1,001	13.0%	72.3%
Total Af.Am	4,222	43.3%	600	29.2%	14.2%	3,622	47.1%	85.8%
Total non-Af.Am	5,528	56.7%	1,456	70.8%	26.3%	4,072	52.9%	73.7%
Total	**9,750**	**100%**	**2,056**	**100%**	**21.1%**	**7,694**	**100%**	**78.9%**

[1] Calculated as the number in each race/sex category divided by the total number of eligible (2,056) applicants.
[2] Calculated as the number of eligible applicants in each race/sex category divided by the total number of cases reviewed for that race/sex category.
[3] Calculated as the number in each race/sex category divided by the total number of ineligible (7,694) applicants.
[4] Calculated as the number of ineligible applicants in each race/sex category divided by the total number of cases reviewed for that race/sex category.

Comparison of ARCR Recipients with our Analysis of Case Files

In the three years from 1998 to 2000, 4,277 applicants have received ARCR in Florida, as shown in Table 2.[2] The number of successful ARCR grantees is much smaller than the number determined eligible after the initial review. For example, Table 1 shows that in the year 2000 2,056 persons were eligible for the automatic restoration process, but Table 2 shows that only 985 persons were actually granted ARCR in 2000. Our data sources do not address why these differences occur, but the Rules of Executive Clemency allow the Clemency Board to object to the restoration of civil rights under Florida law after the initial eligibility determination. If three or more members of the Board object, the individual must pursue restoration through the non-automated procedure. This table indicates the sex and race distribution of successful ARCR grantees taken from these summary statistics relative to successful RCR (Restoration of Civil Rights outside the automated procedure) grantees observed in our analysis of case files from the Office of Executive Clemency. Although our sample of case files includes a relatively small number of cases from 1998-2000, it is instructive to compare the race and sex distribution of these cases with those reported in ARCR summary statistics.

2. These numbers differ from those reported in Table 6 of my expert report dated 8/8/01. The totals in the expert report were based on summary statistics ("Cases Handled by the Clemency Office," 1964-2000) provided by Janet Keels at the Office of Executive Clemency (faxed June 19, 2000), whereas these are based on summary statistics "Restoration of Civil Rights Granted Without Hearing 1998, 1999, 2000," Bates number EOG00359, which were produced in response to plaintiffs' interrogatories and faxed to me by Brennan Center attorneys on August 8, 2001.

Table 2 shows that whereas 57 percent of those granted restoration through the automatic process (ARCR) were white males, over 65 percent of those granted restoration in the files we examined (RCR) were white males. We therefore observed a greater percentage of white male restorations in our sample of files from the Office of Executive Clemency than were reported in the summary statistics concerning the automatic restoration process. Overall, approximately 25 percent of those actually receiving ARCR were African American, relative to about 17 percent of those receiving restoration of voting rights through the non-automatic (RCR) process in our sample of case files.

In summary, African Americans accounted for 43.3 percent of those whose files were reviewed, 29.2 percent of those determined eligible for the automatic process, 25.3 percent of those granted restoration through the ARCR process, and 17.4 percent of those granted restoration through the non-automatic RCR process in the year 2000. Figure 1 displays the declining share of African Americans represented at each successive stage of the process governing restoration of civil rights.

Table 2. Applicants Restored to Civil Rights, 1998-2000, by Race and Sex.

	ARCR Summary Statistics				*E.C. File Sample*
	Successful ARCR Applicants				RCR Grantees[3]
Category	1998	1999	2000	1998-2000	1998-2000
White Male	629 56.2%	1,254 57.7%	554 56.2%	2,437 57.0%	79 65.3%
White Female	153 13.7%	338 15.6%	158 16.0%	649 15.2%	15 12.4%
Af.Am. Male	216 19.3%	372 17.1%	176 17.9%	764 17.9%	10 8.3%
Af.Am. Female	87 7.8%	160 7.4%	71 7.2%	318 7.4%	11 9.1%
Hispanic Male	26 2.3%	35 1.6%	14 1.4%	75 1.8%	4 3.3%
Hispanic Female	4 0.4%	7 0.3%	5 0.5%	16 0.4%	1 0.8%
Other Male	2 0.2%	6 0.3%	6 0.6%	14 0.3%	1 0.8%
Other Female	2 0.2%	1 0.1%	1 0.1%	4 0.1%	0 0.0%
TOTAL	1,119 100.0%	2,173 100.0%	985 100.0%	4,277 100.0%	121 100.0%
Percent White	69.9%	73.3%	72.3%	72.2%	77.7%
Percent Af.Am.	27.1%	24.5%	25.1%	25.3%	17.4%
Percent Hispanic	2.7%	1.9%	1.9%	2.1%	4.1%
Percent Other	0.4%	0.3%	0.7%	0.4%	0.8%
Percent Female	22.0%	23.3%	23.9%	23.1%	22.3%
Percent Male	78.0%	76.7%	76.1%	76.9%	77.7%

[3] Sample numbers are weighted, with weights proportional to the inverse of their selection probabilities. See the expert report for more detail on sample weighting procedures. One case with valid sex information was missing data on race.

Comparing ARCR with Successful Releases from Supervision.

Based on data from Bureau of Justice Statistics sources, including *Correctional Populations in the United States, Probation and Parole in the United States,* and *The Sourcebook of Criminal Justice Statistics* annual series, we estimate that approximately 155,511 felony offenders were successfully released from supervision in Florida in 1998-2000, as shown in Table 3. Although not all of these releases represent a unique case (that is, the same person may have been released more than once over the 3-year period), the totals in Table 3 should approximate the flow of offenders whose eligibility for restoration of civil rights must be determined in a given year. At this time, we do not know why fewer than 10,000 files are reviewed for ARCR each year (e.g., 9,750 in 2000) when the number of unconditional releases from Florida prisons, conditional parole releases, and felony probation releases is much larger.

Based on population reports in Bureau of Justice Statistics publications (e.g., *Correctional Populations in the United States, Probation and Parole in the United States*), we estimate that approximately 61,819 of those released from 1998-2000 were African American offenders (or about 39.8 percent). In the same years, 4,277 were automatically restored to civil rights, with 1,082 of these African Americans (25.3 percent). For the three-year period from 1998 to 2000, we find that approximately 2.8 percent of the estimated total successful releasees were automatically restored to civil rights. About 1.8 percent of the estimated African Americans successfully released from supervision received ARCR, compared to 3.4 percent of non-African Americans successfully released from supervision. Although we caution that our estimates of the number of successful releasees are not precise head counts (see the discussion in the expert report for our methodology), the percentage of these releasees that are granted automatic restoration appears to be very small.

Provisional Conclusions

These data on eligibility for Automatic Restoration of Civil Rights (ARCR) in Florida are a useful supplement to those presented in my Expert Report. Although I currently only have access to summary statistics for the past few years, I can draw the following provisional conclusions.

First, African Americans are under-represented among those eligible for automatic restoration – only about 14 percent of those reviewed were determined to be eligible for ARCR in comparison to about 26 percent of the non-African Americans

African Americans and Non-African Americans in Each Stage of the Restoration of Civil Rights Process, 2000

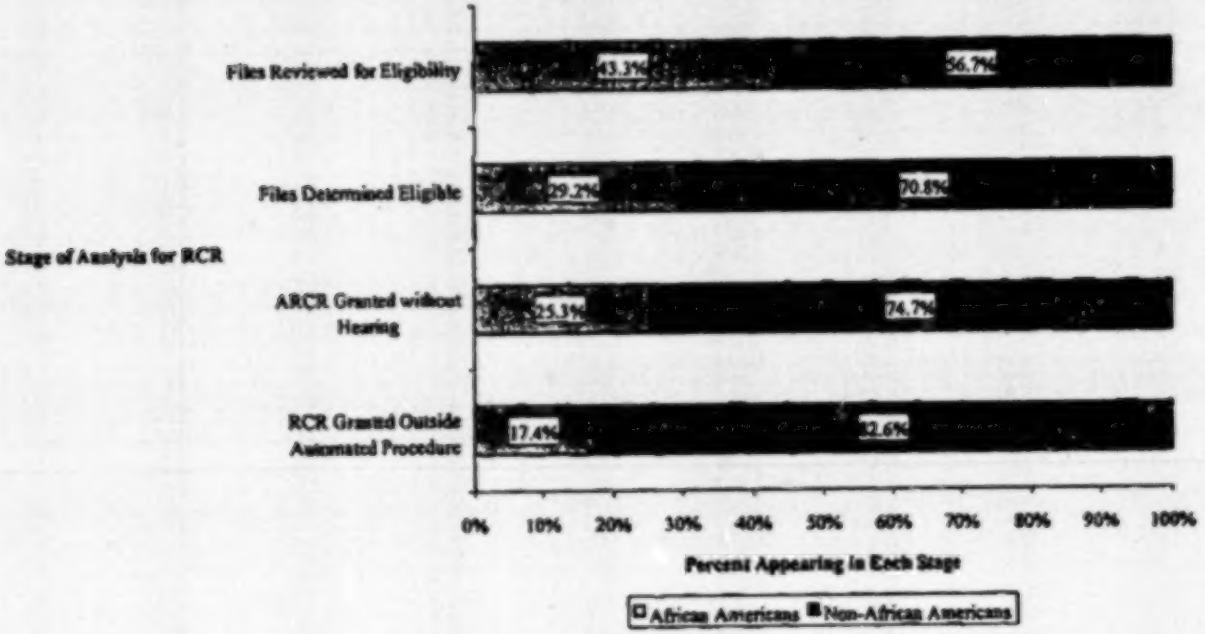

Table 3. Successful Releases and Restoration of Civil Rights by Race, 1998-2000.

Successful Releases	1998	1999	2000	1998-2000
Total	44,666	54,661	56,184	155,511
African American	18,167	21,537	22,115	61,819
Non-African American	26,499	33,124	34,069	93,692
ARCR granted	**1998**	**1999**	**2000**	**1998-2000**
Total	1,119	2,173	985	4,277
African American	303	532	247	1,082
Non-African American	816	1,641	738	3,195
ARCR Rate	**1998**	**1999**	**2000**	**1998-2000**
Total	2.5%	4.0%	1.8%	2.8%
African American	1.7%	2.5%	1.1%	1.8%
Non-African American	3.1%	5.0%	2.2%	3.4%

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No. 05-212

In The Supreme Court of the United States

THOMAS JOHNSON, *et al.*,

Petitioners,

v.

JEB BUSH, Governor of Florida, *et al.*,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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INTRODUCTION

Every State in the Union, save two, prohibits, to one degree or another, felons from voting. This penal restriction on the franchise is deeply rooted in the Nation's history and is expressly sanctioned by the Fourteenth Amendment itself. Judge Friendly summarized the purposes of these laws as follows:

> [I]t can scarcely be deemed unreasonable for a state to decide that perpetrators of serious crimes shall not take part in electing the legislators who make the laws, the executives who enforce these, the prosecutors who must try them for further violations, or the judges who are to consider their cases. . . . A contention that the equal protection clause requires New York to allow convicted mafiosi to vote for district attorneys or judges would not only be without merit but as obviously so as anything can be.

Green v. Board of Elections, 380 F.2d 445, 451-52 (2d Cir. 1967). As recently as *Romer v. Evans*, 517 U.S. 620, 634 (1996), this Court observed that felon disenfranchisement laws are "unexceptionable."

Petitioners advance the claim that Congress has sought to enforce the Fourteenth Amendment by extending the "results" standard of Section 2 of the Voting Rights Act to all felon disenfranchisement laws. To accept petitioners' interpretation of Section 2, this Court must conclude that Congress in 1982 intended to cast into doubt the criminal justice system of 48 States and intended to apply a standard that threatens to forbid a venerable and ubiquitous practice that is expressly contemplated and sanctioned by the very same Amendment. Petition Appendix ("Pet. App.") 35a n.32. It is unfathomable that Congress would intrude so deeply into the sovereign right of every State to set qualifications for voting and to establish punishments for

felons without leaving at least some indication in the legislative record that it intended such a radical result.

Petitioners' interpretation of Section 2 is foreclosed because it would expand that statute beyond the limits of Congress's enforcement power under Section 5 of the Fourteenth Amendment. This Court has repeatedly emphasized that Congress can apply prophylactic legislation to the States under its Fourteenth Amendment enforcement powers only if it has made explicit findings that the States have engaged in a widespread pattern of unconstitutional conduct that warrants such a federal remedy. Where, as here, there are no such findings, Congress cannot act. Moreover, the clear statement rule of *Gregory v. Ashcroft*, 501 U.S. 452 (1991), requires that any such incursion into a core function of the States must be expressed in unmistakable terms – surely, a legislative record in 1965 *approving* felon disenfranchisement laws and a silent legislative record in 1982 does not satisfy this standard.

Perhaps in light of this reality, petitioners also mount an equal protection challenge to Florida's felon disenfranchisement law. As the Eleventh Circuit stressed, however, petitioners themselves stipulated that Florida's current law, enacted in 1968, was not adopted for racially discriminatory purposes. Petitioners nevertheless seek to impute the unrecorded motives of legislators from a century earlier to the drafters of Florida's current Constitution. Not surprisingly, there is no split among the circuits on this issue. A racially neutral state law adopted without invidious purpose plainly does not violate the Equal Protection Clause.

COUNTERSTATEMENT OF THE CASE

Petitioners' statement of the case is neither complete nor accurate, and we offer this brief counterstatement to address their more important omissions and errors.

1. At its founding in 1838, Florida adopted its original criminal disenfranchisement provision, which extended to those convicted of "infamous crimes." Given that blacks were unable to vote at that time, petitioners' historical expert conceded, and the Eleventh Circuit found, that the "origin" of the felon disenfranchisement rule had nothing to do with race discrimination. Pet. App. 7a.

The Eleventh Circuit observed that "[t]he [petitioners] introduced *no* contemporaneous evidence showing that racial discrimination motivated the adoption of the 1868 provision." Pet. App. 18a (emphasis added). Instead, petitioners rest their claim that the 1868 provision was motivated by a racist intent on a series of inflammatory racist comments, but none – *not one* – of these statements relates to the intent behind the felon disenfranchisement provision adopted in 1868. Pet. App. 10a. Rather, the racist comments cited by petitioners all relate to the other provisions in the 1868 Constitution. Pet. App. 10a. Indeed, as the Eleventh Circuit noted, "the [petitioners'] own historical expert conceded that prior to the instant case, no historian who had studied Florida's 1868 Constitution had ever contemplated that the 1868 criminal disenfranchisement provision was enacted with discriminatory intent." Pet. App. 9a.

2. Florida's current felon disenfranchisement provision was enacted in 1968 as a result of an extensive deliberative process. Pet. App. 11a-15a. Specifically, the Constitutional Review Commission established a Subcommittee on Elections and Suffrage to draft, *inter alia*, a constitutional provision specifying the qualifications for voters. The Subcommittee considered several competing alternatives that would have ended automatic felon disenfranchisement. Pet. App. 13a-14a. After "considerable discussion," the Subcommittee adopted the current provision, which substantively narrowed the scope of the disenfranchisement provision by re-enfranchising those

convicted of petty larceny and other misdemeanors. Pet. App. 14a n.16. Thus, the Eleventh Circuit concluded that the 1968 law was "markedly different from Florida's 1868 version." Pet. App. 12a; *see* Pet. App. 11a-13a.[1]

3. Petitioners emphasize the disproportionate impact of Florida's felon disenfranchisement laws, and contend that Florida's criminal justice system discriminates against blacks in convictions. But the overwhelming number of Florida's disenfranchised felons are white – some 70 percent of the 617,000-member Plaintiff class. Pet. App. 3a n.2. For these felons, race has obviously played no role in their disenfranchisement.

In any event, the *undisputed* evidence demonstrates that Florida's criminal justice system operates in a race-neutral manner: (1) there is *no racial disparity* as between "felony arrests" and "felony convictions," and (2) there is *no racial disparity* in the sentences received by convicts with similar sentencing guideline scores.[2] Pet. App. 33a n.31.

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[1] As the Eleventh Circuit noted, petitioners attempted below to argue to the contrary based on materials that were not part of the record and that had been specifically excluded by the district court. Pet. App. 11a n.13. Petitioners have not sought review of this evidentiary ruling, and thus it is inappropriate for them to continue to cite to these extra-record materials. *See, e.g.*, Pet. 5 & n.3, 7 n.4.

[2] Petitioners' expert attempted to evade this conclusion by ignoring the entire population of offenders who were successfully convicted on a felony charge, but whose disposition reflected the judicial decision to "withhold adjudication." In Florida, certain offenders are eligible for "adjudication withheld," which carries no imprisonment and no loss of civil rights, but may require supervision akin to house arrest or probation. *See* FLA. STAT. § 948.01. Individuals who receive this have received "convictions." Petitioners have argued that sentences of "adjudication withheld" should be ignored because they do not result in the loss of voting rights. But if petitioners are trying to prove that discretionary judgments made from arrest to conviction are biased against blacks (*i.e.*, that black "felony arrests" are more likely to lead to

(Continued on following page)

REASONS FOR DENYING THE WRIT

I. Section 2 Of The Voting Rights Act Does Not Reach Felon Disenfranchisement Provisions.

Petitioners are correct that the courts of appeals have reached different conclusions as to whether Section 2 of the Voting Rights Act applies to felon disenfranchisement laws. With the exception of the Ninth Circuit, however, every court to consider a Section 2 challenge to a felon disenfranchisement law has dismissed such a claim as a matter of law. Indeed, Judge Paez's decision for the Ninth Circuit did not analyze the applicability of the constitutional avoidance and clear statement doctrines that led the Eleventh Circuit *en banc* in this case and a panel of the Second Circuit in *Muntaqim v. Coombe*, 366 F.3d 102 (2d Cir.), *cert. denied*, 125 S. Ct. 480, *and rehearing en banc granted*, 396 F.3d 95 (2d Cir. 2004), to conclude that Section 2 does not even reach such statutes.[3] As we demonstrate below, if the Ninth Circuit had considered the proper scope of Section 2, it would have been compelled to

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felony convictions than are white "felony arrests"), then they have to consider *all* felony convictions. There is no dispute that when *all* felony convictions are compared with the population of arrests actually identified as felony arrests by the State's official database, the "unexplained racial disproportionality" shown by petitioners' expert disappears *entirely*, and there is instead a slight unexplained racial disproportionality disfavoring *whites*.

[3] Petitioners trumpet the decisions of the Sixth Circuit in *Wesley v. Collins*, 791 F.2d 1255 (6th Cir. 1986), and the Fourth Circuit in *Howard v. Gilmore*, No. 99-2285, 2000 U.S. App. LEXIS 2680 (4th Cir. Feb. 23, 2000). But both cases dismissed Section 2 challenges to felon disenfranchisement laws as a matter of law without addressing whether Section 2 applies to such laws. The Sixth Circuit concluded that Tennessee's felon disenfranchisement law did not result in a denial of the vote "on account of race," but rather on account of the plaintiffs' decision to commit felonies. 791 F.2d at 1262. The same reasoning applies equally here and serves as an independent basis of affirmance. *See also Howard*, 2000 U.S. App. LEXIS 2680, at *3 (citing *Wesley*).

reach the same conclusion as the Eleventh Circuit in this case. Moreover, the Eleventh Circuit's reasoning closely parallels the Second Circuit's in *Muntaqim*, a decision this Court declined to review. Petitioners here fail to articulate any reason why their petition should not be denied for the same reasons.

A. Extending The Results Test Of Section 2 To Felon Disenfranchisement Laws Would Exceed Congress's Enforcement Power Under The Fourteenth Amendment.

Section 5 of the Fourteenth Amendment gives Congress power to "enforce" that Amendment's substantive provisions "by appropriate legislation." U.S. CONST. amend. XIV, § 5. This Court has held that this power is not limited to enforcing the Amendment's substantive provisions: "Legislation which deters or remedies constitutional violations can fall within the sweep of Congress's enforcement power even if in the process it prohibits conduct which is not itself unconstitutional . . . ." *City of Boerne v. Flores*, 521 U.S. 507, 518 (1997). "In other words, Congress may enact so-called prophylactic legislation that proscribes facially constitutional conduct, in order to prevent and deter unconstitutional conduct." *Nevada Dep't of Human Res. v. Hibbs*, 538 U.S. 721, 727-28 (2003).

"[A]s broad as the congressional enforcement power is, it is not unlimited." *Oregon v. Mitchell*, 400 U.S. 112, 128 (1970) (Black, J.). "There must be a congruence and proportionality between the injury to be prevented or remedied and the means adopted to that end." *Boerne*, 521 U.S. at 520; *Hibbs*, 538 U.S. at 728. This standard has two overlapping requirements. For Congress to enact prophylactic legislation, it must (1) "identify conduct transgressing the . . . substantive provisions" of the Amendment and (2) "tailor its legislative scheme to remedying or preventing such

of race." *Oregon*, 400 U.S. at 130 (Black, J.) (emphasis added).

Because this proto-*Boerne* analysis "applies as much to felon disenfranchisement laws as it does to state laws governing the minimum voting age," the courts must scrutinize applying Section 2 to felon disenfranchisement laws with equal care. *Muntaqim*, 366 F.3d at 122; *Farrakhan v. Washington*, 359 F.3d 1116, 1122 (9th Cir. 2004) (Kozinski, J., dissenting); *Baker v. Pataki*, 85 F.3d 919, 927-28 (2d Cir. 1996) (Mahoney, J.). Applying this analytical framework, the *en banc* Eleventh Circuit in this case concluded, by a vote of 10-2, that Section 2 does not apply to felon disenfranchisement provisions. Pet. App. 32a-43a.[4]

1. The legislative record of Section 2 does not mention, let alone establish, a history and pattern of purposefully discriminatory use of felon disenfranchisement laws against minorities. Pet. App. 36a (noting the "complete absence of congressional findings that felon disenfranchisement laws

[4] In analyzing this issue, it is critical to distinguish between felon disenfranchisement laws that either were enacted or are maintained for the *purpose* of discriminating against blacks, on the one hand, and felon disenfranchisement laws that are not infected by such a racially discriminatory purpose, on the other hand. There is little doubt that a purposefully discriminatory provision, such as the Alabama disenfranchisement law struck down as unconstitutional in *Hunter v. Underwood*, 471 U.S. 222 (1985), falls within Section 2's prohibition. First, a felon disenfranchisement law, although facially neutral, whose very purpose is to deny the vote "on account of race" is unambiguously within the text and intent of Section 2. Second, the *Gregory* clear statement rule *does not apply* to require an affirmative textual manifestation in Section 2 of Congress's intent to reach a purposefully discriminatory felon disenfranchisement provision: applying Section 2's prohibition to invalidate such a law *coincides* with, rather than upsets, the constitutional state-federal balance struck by the Fourteenth and Fifteenth Amendments. But applying Section 2 to invalidate a felon disenfranchisement law that, like Florida's, is racially neutral both on its face and in its intent would dramatically upset the constitutional state-federal balance.

were used to discriminate against minority voters"). Petitioners' failure to identify any such findings should end this Court's inquiry. Since *Oregon*, this Court has consistently required a legislative record reflecting a history and pattern of unconstitutional state conduct that justifies prophylactic legislation. *See, e.g.*, *Kimel v. Florida Bd. of Regents*, 528 U.S. 62, 91 (2000); *Garrett*, 531 U.S. at 368, 370.

Nothing in this Court's recent decisions in *Hibbs* and *Tennessee v. Lane*, 541 U.S. 509 (2004), suggests that the Court has retreated from this rule that prophylactic legislation must be supported with a legislative record reflecting a history and pattern of unconstitutional state conduct. To the contrary, the Court simply applied the rule in those cases and found that Congress had made the necessary findings. In *Hibbs*, for example, the Court said that it had to "inquire whether Congress had evidence of a pattern" of gender-based discrimination in the workplace by States to assess the validity of the Family and Medical Leave Act. *Hibbs*, 538 U.S. at 729. After thoroughly reviewing the record, the Court concluded that "the States' record of unconstitutional participation in, and fostering of, gender-based discrimination in the administration of leave benefits is weighty enough to justify the enactment of prophylactic [Enforcement Clause] legislation." *Id.* at 729-35. Similarly, the Court in *Lane* upheld Title II of the ADA, which prohibits disability discrimination in public services, as applied to state-court access because Congress collected an "extensive record of disability discrimination." *Lane*, 541 U.S. at 529. In other words, *Hibbs* and *Lane*, like *Oregon*, *Boerne*, and this Court's other recent federalism cases, carefully reviewed the legislative record to ensure that Congress had an adequate constitutional basis

for prophylactic legislation – and did not suggest that such findings are unnecessary.[6]

When one examines the Voting Rights Act's legislative record, it becomes evident why petitioners wish to avoid this inquiry, for "[i]nstead of a clear statement from Congress indicating that the [petitioners'] interpretation is correct, the legislative history indicates just the opposite – that Congress never intended the Voting Rights Act to reach felon disenfranchisement provisions." Pet. App. 38a; *see also Baker*, 85 F.3d at 929 (Mahoney, J.) ("[n]ot only has Congress failed ever to make a legislative finding that felon disenfranchisement is a pretext or proxy for racial discrimination; it has effectively determined that it is not.").

2. Applying Section 2 to all felon disenfranchisement laws, including those enacted and enforced without a racially discriminatory purpose, plainly would not be a congruent and proportional remedy to the problem of state legislatures, as the Second Circuit put it, "motivated by racial animus . . . avoiding the strictures of the Voting Rights Act by enacting facially neutral election laws that disproportionately affected black voters." *Muntaqim*, 366

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[6] Petitioners suggest that the legislative record must be read with greater deference when Congress acts against racial discrimination in voting. Pet. 17. True enough, this Court has asked less of the congressional record when purportedly prophylactic legislation protects fundamental rights and protected classes. *Lane*, 541 U.S. at 527-29 (court access); *Hibbs*, 538 U.S. at 735-36 (sex). But neither *Lane* nor *Hibbs* involved a specific practice such as felon disenfranchisement that is expressly reserved to the States in the text of the Constitution. U.S. CONST. amend. XIV, § 2. Thus, the structure and substance of the Constitution require deference to the States' policy decisions on felon disenfranchisement. In any event, there must be at least *some* legislative findings of a historical pattern of unconstitutional use of the challenged practice; here there are *none*. Pet. App. 35a-36a (noting "absence of congressional findings [showing] that felon disenfranchisement laws [a]re used to discriminate").

F.3d at 124. Most important, applying Section 2 to felon disenfranchisement laws would conflict with the Fourteenth Amendment's explicit acceptance of such laws. U.S. CONST. amend. XIV, § 2. In upholding California's felon disenfranchisement law against a nonracial equal protection challenge, this Court explained that the Framers of the Fourteenth Amendment "could not have intended to prohibit outright in [the Equal Protection Clause of] § 1 of that Amendment that which was expressly exempted from the lesser sanction of reduced representation imposed by § 2 of the Amendment." *Richardson v. Ramirez*, 418 U.S. 24, 43 (1974). So too here. It would be anomalous, to say the least, if the Framers of the Civil War Amendments protected felon disenfranchisement laws from the penalty of reduced representation, but authorized Congress to prohibit such laws even if passed without racially discriminatory intent and in the absence of any congressional findings of their purposefully discriminatory use.[6]

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[6] Petitioners misleadingly imply that Congress decided not to add a felon disenfranchisement proviso to the Fifteenth Amendment after debating its merits. Pet. 15. This is not so. Congressional Republicans disagreed over how far the proposed amendment should reach. *See* Xi Wang, *Bondage, Freedom, and the Constitution*, 17 CARDOZO L. REV. 2153, 2216 (1996). Radicals like Representative Shellabarger wanted to ban all voting qualifications except those relating to age, citizenship, sex, mental status, and law-abiding status. Hence, his proposal affirmatively protected the voting rights of 21-year-old male citizens who were "of sound mind" and had not been "duly convicted of treason, felony, or other infamous crime." 67 H.R.J. 233-34 (Jan. 30 1869). Moderates, on the other hand, merely wanted to protect black suffrage. Wang, *supra*, at 2216. Shellabarger's proposal was a typical Radical effort to ban qualifications in addition to race; as his ally explained in the same debate that petitioners cite, the Moderates' language would still permit qualifications based on "property," "intellect," and "sect." CONG. GLOBE, 40th Cong., 3d Sess. 722 (1869). Congress defeated the Radicals' proposals not because they permitted felon disenfranchisement, but because they went far beyond "the great trouble and the great disgrace of the country" – namely, racial discrimination. *Id.* at

(Continued on following page)

In any event, extending petitioners' expansive conception of Section 2 to felon disenfranchisement laws would render it, to that extent, unconstitutional. Section 2 applies nationwide to the felon disenfranchisement laws of all States, no matter when enacted and regardless of whether the State has any history of discriminatory voting practices. When the Fourteenth Amendment was ratified, 29 of 36 States had constitutions prohibiting felons from voting or authorizing their legislatures to adopt felon disenfranchisement laws. *Richardson*, 418 U.S. at 48. As the court below noted, since blacks could not vote at the time, it is clear that these felon disenfranchisement laws were not enacted for a racially discriminatory purpose. Pet. App. 29a; *see Muntaqim*, 366 F.3d at 123; *Howard v. Gilmore*, No. 99-2285, 2000 U.S. App. LEXIS 2680 (4th Cir. Feb. 23, 2000). But, if petitioners' theory is correct, Section 2 nonetheless threatens felon disenfranchisement laws nationwide because racial minorities are overrepresented in the prison populations throughout the country. Pet. App. 35a.

Petitioners' theory thus creates a sweeping, radical remedy that would cast grave doubt on all felon disenfranchisement laws nationwide, laws not only as old as our Republic, but also expressly and uniquely authorized by the Constitution. This grossly disproportionate remedy would far exceed Congress's Enforcement Clause powers. In *United States v. Morrison*, 529 U.S. 598, 626 (2000), the Court invalidated the Violence Against Women Act's civil-remedy provision because it "applie[d]

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725. Indeed, the very fact that the Radicals recognized that their sweeping proposals would ban felon disenfranchisement and therefore included provisos expressly authorizing that practice – just as they had in Section 2 of the Fourteenth Amendment – demonstrates that even the Radicals did not intend to affect felon disenfranchisement with the Fifteenth Amendment.

uniformly throughout the [n]ation," including States that had no history of discriminating against victims of gender-motivated crimes. The Court distinguished this provision from certain sections of the Voting Rights Act upheld in *Morgan* and *South Carolina*, because those sections carefully targeted States with a history of discrimination. *Morrison*, 529 U.S. at 626-27. Moreover, Section 2, as applied to felon disenfranchisement laws, would have no termination date or mechanism. In striking down the Religious Freedom Restoration Act, the Court specifically noted this very flaw. *Boerne*, 521 U.S. at 532. The Court contrasted these features with the Voting Rights Act sections upheld in *South Carolina* and *City of Rome v. United States*, 446 U.S. 156 (1980), *Boerne*, 521 U.S. at 532-33, which were in place for 5 and 7 years, respectively.

While antidiscrimination legislation need not have "termination dates, geographic restrictions[,] or egregious predicates[,] . . . limitations of this kind tend to ensure Congress' means are proportionate to ends legitimate under" the Enforcement Clause. *Boerne*, 521 U.S. at 533. But applying Section 2 to all felon disenfranchisement laws, including those enacted and enforced without racially discriminatory purpose, would be "so out of proportion to a supposed remedial or preventive object that it cannot be understood as responsive to, or designed to prevent, unconstitutional behavior." *Id.* at 532. Thus, the *en banc* Eleventh Circuit quite properly avoided reaching this result by interpreting Section 2 not to reach felon disenfranchisement laws that are racially neutral in purpose. "[W]here an otherwise acceptable construction of a statute would raise serious constitutional problems, the Court will construe the statute to avoid such problems unless such construction is plainly contrary to the intent of Congress." *Edward J. DeBartolo Corp. v. Florida Gulf Coast Bldg. & Constr. Trades Council*, 485 U.S. 568, 575 (1988) (citation omitted).

B. The Clear Statement Rule Precludes Petitioners' Interpretation Of Section 2.

The clear statement rule of *Gregory v. Ashcroft*, 501 U.S. 452, 460-61 (1991), serves as an independent basis supporting the court of appeals' conclusion that Section 2 does not apply to felon disenfranchisement laws. Pet. App. 37a n.35. "If Congress intends to alter the usual constitutional balance between the States and the Federal Government, it must make its intention to do so unmistakably clear in the language of the statute." *Gregory*, 501 U.S. at 460-61 (citations and internal quotation marks omitted). This "clear statement" rule applies to the construction of federal statutes touching on "traditionally sensitive areas, such as legislation affecting the federal balance," and it is designed to "assure[] that the legislature has in fact faced, and intended to bring into issue, the critical matters involved in the judicial decision." *Id.* at 461 (citations and internal quotation marks omitted). In *Gregory*, the Court applied this canon to the sweeping language of the Age Discrimination in Employment Act ("ADEA"), holding that it did not reach Missouri's mandatory retirement age for state judges even though the Act covered all state "employees." Although the ADEA's exception for " 'appointee[s] on the policymaking level' " did not appear on its face to apply to judges, Congress's intent on the issue was "at least ambiguous," and in light of the State's traditional authority in this area, this Court insisted on an "unmistakably clear" statutory expression of Congress's intent to include state judges within the Act's scope. *Id.* at 467.[7]

Construing Section 2 to apply to felon disenfranchisement laws would obviously implicate the constitutional balance between the States and the federal

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[7] *See, e.g., NLRB v. Catholic Bishop of Chicago*, 440 U.S. 490, 506 (1979); *Atascadero State Hosp. v. Scanlon*, 473 U.S. 234, 242 (1985).

government. Pet. App. 37a n.35. "'[T]he states have the primary responsibility for regulating the times, places, and manner of conducting federal elections, U.S. CONST. art. I, § 4, cl. 1, and even more obviously for regulating elections to state office.'" *Muntaqim*, 366 F.3d at 122 (quoting *Baker v. Pataki*, 85 F.3d 919, 931 (2d Cir. 1996) (Mahoney, J.)). Indeed, as previously emphasized, the States' authority to disenfranchise felons is expressly recognized in Section 2 of the Fourteenth Amendment. It is therefore clear that applying Section 2 to invalidate a felon disenfranchisement law that was neither enacted nor maintained with a racially discriminatory purpose would upset the state-federal balance of constitutional authority. *Gregory*'s clear statement rule therefore applies, and the text of Section 2 does not satisfy it.[8]

Section 2 of the Voting Rights Act prohibits the enforcement of any "qualification or prerequisite to voting" that "results in a denial or abridgement of the right of any citizen of the United States to vote *on account of race or color*." 42 U.S.C. § 1973(a) (emphasis added). Applying Section 2 to invalidate a felon disenfranchisement law that is racially neutral both on its face and in its intent would

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[8] Petitioners' reliance on *Chisom v. Roemer*, 501 U.S. 380 (1991), is misplaced. Pet. 17. *Chisom* applied Section 2 to multimember districts for state judicial office without mentioning the clear statement rule. *Chisom*, 501 U.S. at 383-84. But this holding cannot be read to mean that the clear statement rule should not apply to an effort to extend Section 2 to racially neutral felon disenfranchisement laws. Felon disenfranchisement laws sweep across all state and federal offices, have textually recognized constitutional status, and have been in widespread use by the States since the Founding. In contrast, judicial office is just one kind of state office, has no textually recognized constitutional status, and need not even be elective. Further, regulating judicial elections does not impede a state's ability to enforce its penal laws, as would applying Section 2 to racially neutral felon disenfranchisement laws.

dramatically upset the constitutional state-federal balance.[9] As noted previously, all States, save two, have some form of felon disenfranchisement law, and such provisions have been common to States throughout our Nation's history. *Muntaqim*, 366 F.3d at 123; *Farrakhan*, 359 F.3d at 1125 (Kozinski, J., dissenting). Racial disparities in the rates of felony convictions, and thus in felon disenfranchisement, are equally ubiquitous among States. *See Muntaqim*, 366 F.3d at 1125; Pet. App. 35a. That Congress intended to sweep all such felon disenfranchisement laws within Section 2's prohibition against laws denying the vote "on account of race" is not at all clear from the text of the statute. To the contrary, to the extent that Section 2's language – "results in a denial . . . of the right . . . to vote *on account of race*" – can be said to have any plain meaning, surely that meaning does not include disenfranchisement pursuant to a law that is facially neutral, that has no racial purpose, that is motivated by an important racially neutral public policy, that is materially indistinguishable from similar laws in virtually every state in the country, both North and South, that results in the disenfranchisement of approximately three times more whites than blacks, and that can trace its ancestry, like most similar state laws, to a time that predates ratification of the Fourteenth and Fifteenth Amendments. Pet. App. 31a n.30. Indeed, as some courts have concluded: "[I]t is not racial discrimination that deprives felons, black or white, of their right to vote but their own decisions to commit an act for which they assume the risks of detection and punishment." *Johnson v. Bush*, 214 F. Supp. 2d 1333, 1341 (S.D. Fla. 2002) (citing *Wesley v. Collins*, 605 F. Supp. 802,

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[9] Of course, an intentionally discriminatory provision would violate Section 1 of the Fourteenth Amendment. *See Hunter v. Underwood*, 471 U.S. 222 (1985).

813 (M.D. Tenn. 1985), *aff'd*, 791 F.2d 1255 (6th Cir. 1986)).

But even assuming that Section 2's text is "at least ambiguous" on this issue,[10] all other evidence of congressional intent cuts sharply against the conclusion that Congress intended the Act to apply to felon disenfranchisement laws that are racially neutral in purpose. It is clear that Section 2 "does not prohibit *all* voting restrictions that have a racially disproportional effect." *Muntaqim*, 366 F.3d at 116 (emphasis in original). And the Act's legislative history strongly indicates, as the *en banc* Eleventh Circuit concluded, "Congress never intended the Voting Rights Act to reach felon disenfranchisement provisions." Pet. App. 38a. Finally, petitioners' sweeping conception of Section 2 cannot be confined to released felons, but would also extend to *incarcerated* felons. And if petitioners' theory is correct, then a wide variety of provisions would be subject to invalidation, including age restrictions on voting that have a disparate impact on minorities. The notion that Congress intended Section 2's "results" test to have this result is, to say no more, highly dubious.[11]

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[10] The language of Section 2's "results" test is anything but plain, and discerning its meaning has given rise to a wealth of conflicting judicial opinions, both among and within the circuits. *See, e.g., Muntaqim*, 366 F.3d at 116 ("Unfortunately, it 'is exceedingly difficult to discern what [Section 2] means.'") (quoting *Goosby v. Hempstead*, 180 F.3d 476, 499 (2d Cir. 1999) (Leval, J., concurring)); Pet. App. 31a n.30. Accordingly, the question whether Congress intended Section 2 to apply to racially neutral felon disenfranchisement laws is not one on which the statutory language and congressional intent are so plain as to preclude a savings construction.

[11] *See Farrakhan*, 359 F.3d at 1126 (discussing implications for updating voter lists, Internet voting, and weekday elections) (Kozinski, J., dissenting).

C. This Case Is A Poor Vehicle To Resolve The Section 2 Issue.

This case is a poor vehicle in which to consider the issue of whether Section 2 applies to felon disenfranchisement laws. As the *en banc* Eleventh Circuit found, "a review of the record strongly suggests that the [petitioners'] Section 2 claim would still fail." Pet. App. 33a n.31. Specifically, the Eleventh Circuit stated:

> Although the record includes some evidence of a statistical difference in the rate of felony convictions along racial lines, these disparities do not demonstrate racial bias. There are a myriad of factors other than race that may explain the disparity. For example, an individual's socioeconomic status, prior criminal record, gravity of offense, strength of evidence, nature of legal representation, and age of offender might explain the disparity. Moreover, the [petitioners'] own expert found that *whites* have disproportionately high conviction rates for four of the nine categories of crimes he analyzed. Furthermore, there is no significant racial disparity in the sentences received by convicts with similar guideline scores.

Pet. App. 33a n.31 (emphasis in original). Judge Tjoflat in his separate concurrence noted that petitioners' "brief does not appear to advance a single showing of contemporary race bias." Pet. App. 54a. In short, petitioners' case reduces to nothing more than a showing of a disparity among the relative numbers of minorities and nonminorities serving prison sentences in Florida. Courts have consistently rejected the Section 2 challenges based on such a showing of mere disparate impact.[13]

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[13] *See, e.g., Ortiz v. City of Philadelphia*, 28 F.3d 306, 315 (3d Cir. 1994); *Irby v. Virginia State Bd. of Elections*, 889 F.2d 1352, 1358-59

(Continued on following page)

At a more fundamental level, petitioners lost their voting rights not "on account of race," but on account of one – and only one – factor: their decision to commit a crime so serious that it was designated a felony. *Wesley v. Collins*, 605 F. Supp. 802, 813 (M.D. Tenn. 1985); Pet. App. 53a (Tjoflat, J., concurring) ("[T]he cause of the denial of the right to vote to felons in Florida consists entirely of their conviction, not their race."). Disparities in arrest, conviction, incarceration, and parole rates in Florida's criminal justice system do not change the fact that those in prison lost their voting rights on account of their own conduct.

II. Petitioners' Equal Protection Theory Does Not Warrant This Court's Review, As The Circuits Are In Agreement On It And It Cannot Succeed In Any Event.

The second question that petitioners maintain warrants review by this Court is not even colorable. As the Eleventh Circuit noted, "we are concerned here with the validity of the *1968 provision*, not the 1868 provision and the [petitioners] concede that the 1968 provision was not enacted with discriminatory intent." Pet. App. 18a (emphasis in original). Moreover, what petitioners consistently characterize as a mere "reenactment" in 1968 of the preceding 1868 provision was in fact a substantive revision that gave rise to a "markedly different" provision from its predecessor, as the decision below explained and petitioners do not refute. Pet. App. 12a. This revision occurred only "[a]fter considerable discussion" of the

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(4th Cir. 1989); *Salas v. Southwest Texas Junior Coll. Dist.*, 964 F.2d 1542, 1556 (5th Cir. 1992); *Wesley v. Collins*, 791 F.2d 1255, 1262 (6th Cir. 1986); *Baird v. Indianapolis*, 976 F.2d 357, 359 (7th Cir. 1992); *Smith v. Salt River Project*, 109 F.3d 586, 595 (9th Cir. 1997).

provision and consideration of several competing substantive alternatives thereto, followed by full deliberation surrounding legislative adoption and public ratification. Pet. App. 13a-15a & n.16. There is "no allegation in the [petitioners'] complaint," let alone evidence, that the 1968 process was tainted by any discriminatory intent; "[i]ndeed, the [petitioners] stipulated that there is no evidence that legislators in 1968 were concerned with or considered the consequences of the policy along racial lines." Pet. App. 18a n.19.

In the absence of any evidence of discrimination in the enactment of Florida's current felon disenfranchisement provision, petitioners have sought to condemn this law by imputing to the 1968 legislators the motives of legislators who adopted a predecessor version a century earlier. The Fifth Circuit rejected a similar claim in *Cotton v. Fordice*, 157 F.3d 388 (5th Cir. 1998). Thus, petitioners' equal protection theory has garnered only one vote from among the courts of appeals to have considered it – namely, that of Judge Barkett, the lone dissenter on the *en banc* court below who believed that the issue should go to trial.

A. No Court Accepts Petitioners' Equal Protection Theory And The Decision Below Neither Creates Nor Implicates Any Circuit Split.

This Court in *Hunter v. Underwood*, 471 U.S. 222 (1985), struck down Alabama's then-existing misdemeanant disenfranchisement provision because it had been adopted with a discriminatory intent, holding that "the proper approach to the Fourteenth Amendment discrimination claim was established in *Arlington Heights v. Metropolitan Housing Development Corp.*, 429 U.S. 252, 270, and n.21

The governing doctrine is clear. It has fostered no confusion or disagreement among the courts of appeals. No court has held, as petitioners would ask this Court to hold, that an allegation of discriminatory intent behind a predecessor law enacted a century earlier stands to invalidate an existing law, notwithstanding that the law at issue reflects substantive revision pursuant to a deliberative process that was concededly free of any discriminatory intent. These are the irrefutable facts of this case upon which the decision below turned. Nevertheless, petitioners attempt to conjure a circuit split where there is none.

1. As petitioners correctly say, the Fourth Circuit in *Irby v. Virginia State Board of Elections*, 889 F.2d 1352, 1355 (4th Cir. 1989), simply "declined to decide," Pet. 27, whether a finding of discriminatory intent behind a predecessor policy might suffice to invalidate the policy at issue and simply assumed *arguendo* that it might, holding that any inference of discriminatory intent had been factually rebutted in any event. The Fourth Circuit's agnosticism on petitioners' proposed burden shifting is no basis for granting certiorari.

2. The Fifth Circuit's decision in *Cotton* is, as explained above, in full accord with the decision below and stands as the Fifth Circuit's governing precedent. Much as petitioners argue that *Chen v. City of Houston*, 206 F.3d 502 (5th Cir. 2000), subsequently created tension with *Cotton*, that decision expressly acknowledged *Cotton* as the Circuit's governing law; *Chen* correctly described *Cotton* as establishing that, "while under *Hunter* the discriminatory intent of the original drafter may carry forward despite subsequent judicial invalidation of the most obviously discriminatory provisions, intervening reenactment with meaningful alterations may render the current law valid." *Id.* at 521.

Chen was a racial gerrymandering case that was governed by this Court's decision in *Shaw v. Hunt*, 517

U.S. 899 (1996). The Fifth Circuit took care to observe "that the state of mind involved in prior [districting] plans is not of itself what is precisely and directly the ultimate issue before the court." *Chen*, 206 F.3d at 521. Rather, the intent behind the *current* law is the ultimate issue. That is why the Fifth Circuit emphasized, per *Cotton*, that "when a plan is reenacted – as opposed to merely remaining on the books like the provision in *Hunter* – the state of mind of the reenacting body must also be considered." *Id.* To be sure, the Fifth Circuit in *Chen* discussed the intent behind both the initial districting plan and the immediately ensuing changes because only seven years had passed. Given that there was such a short span between the passages of the prior discriminatory law and the extant law, it was entirely reasonable to look to the motivation behind the predecessor version to assess the intent behind the current law. Even so, the Fifth Circuit reached the same holding as it had in *Cotton*, albeit in a different factual and legal context, rejecting the plaintiffs' *Shaw* challenge in light of the intervening reenactments.

No serious argument can be made that the Fifth Circuit panel in *Chen* thereby overruled or departed from that court's decision in *Cotton*, let alone that *this* Court should intercede in order to resolve some indistinct, intra-circuit split between *Cotton* and *Chen*. Moreover, the potential factual distinction floated in *Chen* – namely, that incremental changes made over a seven-year period following the original discriminatory intent "were not as dramatic as those in *Cotton*" – cannot avail petitioners here, where Florida's predecessor law supposedly bearing a discriminatory intent was thereafter substantively revised, debated, and adopted a full century later by wholly different decision-makers, including both Houses of Florida's Legislature and its voting public.

3. Finally, petitioners are left pointing to the Eleventh Circuit's prior decision in *Knight v. Alabama*, 14 F.3d 1534 (11th Cir. 1994), now claiming it is inconsistent with

the decision below. Their claim is spurious. But even if petitioners were entirely right that the Eleventh Circuit here departed from its earlier decision in *Knight*, that would not in any event warrant the attention of this Court. By sitting *en banc* in deciding this case as it did, the Eleventh Circuit has already ensured the clarity of its own precedents and harmony with its sister circuits.

Even setting that aside, the Eleventh Circuit's decision in *Knight* is inapposite. *Knight* addressed the persisting vestiges in Alabama's system of public higher education of recent, prior *de jure* segregation. Plaintiffs there argued that limited "mission" assignments still constraining the course offerings at Alabama's two historically black universities "[we]re traceable to the limited missions that were imposed on th[ose] two [universities] in the past" pursuant to segregation. *Id.* at 1543. The Eleventh Circuit, heeding this Court's decision in *United States v. Fordice*, 505 U.S. 717 (1992), initially observed that the limited missions were indeed traceable to prior *de jure* segregation, presenting a constitutional violation in need of remedy. 14 F.3d at 1544. This then necessitated a second inquiry under *Fordice* – namely, "whether this vestige of [discrimination] has continuing segregative effects." *Id.* The court carefully delineated that as an "entirely separate question" from one the district court had addressed – namely, "whether the adoption and maintenance since 1975 of the current classification system [imposing the limited missions] can *itself* be deemed an act of intentional discrimination that gives rise to liability *in its own right*." *Id.* at 1544-45 (emphases added).

Here, petitioners pose the very question that the Eleventh Circuit took pains to distinguish from the one it resolved in *Knight*. That is, petitioners here effectively argue that Florida's 1968 disenfranchisement provision, as it currently exists, "can *itself* be deemed an act of intentional discrimination that gives rise to liability *in its own*

right." *See* Pet. App. 22a n.22 ("By contrast [to *de jure* desegregation at issue in *Fordice*], here the question is one of liability, not remedy."). Indeed, the 1868 provision does not have any persisting effects akin to those of segregation (which were the concern of *Knight*) that might justify the drastic remedy of invalidating the existing law. No one is currently disenfranchised under the 1868 law, nor might it credibly be maintained that the 1868 law has any other ongoing practical effect.

4. In the absence of a circuit split, petitioners suggest that the decision below is inconsistent with this Court's decisions in *Fordice* and *McCreary County v. American Civil Liberties Union*, 125 S. Ct. 2722 (2005). That claim cannot withstand scrutiny.

a. Although Mississippi's higher-education admission policies at issue in *Fordice* were race-neutral, this Court deemed them suspect and demanded heightened justifications for them precisely because they followed closely upon Mississippi's prior, intractable system of *de jure* segregation in its schools. *Fordice* therefore reflected the unremarkable proposition that "[t]he Equal Protection Clause is offended by 'sophisticated as well as simple-minded forms of discrimination.'" *Fordice*, 505 U.S. at 729 (quoting *Lane v. Wilson*, 307 U.S. 268, 275 (1939)). The court of appeals explained at length why *Fordice* is, accordingly, inapposite here:

> First, Florida has a valid public policy reason for disenfranchising felons, where Mississippi did not have a sound justification for its education policies. . . .
>
> Second, the current Florida provision was passed one hundred years after the alleged intentional discrimination occurred, whereas Mississippi's provision was passed shortly after the end of *de jure* segregation in education. . . . Given the proximity in time between Mississippi's

> intentional discrimination and the facially neutral provision in education, the Court had a healthy skepticism that the facially neutral provision was indeed neutral. . . . But this skepticism does not apply here, because it is not reasonable to assign any impermissible motives held by the 1868 Florida legislators to the 1968 legislators who voted for the present felon disenfranchisement provision.
>
> Third, Florida's 1968 felon disenfranchisement provision did not continue the adverse disparate impact of earlier *de jure* measures, which makes the present case entirely different than the situation in *Fordice*. . . . In 1968, Florida legislators and voters were not attempting to extend the effects of *de jure* discrimination with a facially-neutral provision because there was little adverse impact to extend by passing the felon disenfranchisement provision. Florida's provision simply did not maintain a pattern of discrimination the way Mississippi's provision did.

Pet. App. 22a-25a. Petitioners tellingly say nothing in response to this thoroughgoing treatment of *Fordice* below.

b. This Court's decision in *McCreary County* is no more availing for petitioners. There, the county had, in the face of a challenge under the Establishment Clause, erected three different displays of the Ten Commandments "within a year." 125 S. Ct. at 2730. In that context, the Court refused to "limit the scope of the purpose enquiry so severely that any trivial rationalization would suffice, under a standard oblivious to the history of religious government action like the progression of exhibits in this case." *Id.* at 2732. A contrary decision would render the "purpose enquiry . . . so naïve that any transparent claim to secularity would satisfy it." *Id.* at 2735. This case falls comfortably beyond any such concern. Just as the "close[ness] . . . in time and subject" connecting the three

displays centrally concerned this Court in *McCreary*, *id.* at 2737, the marked separation between the 1868 and 1968 provisions forecloses any such concern. Indeed, all agree here that there is no evidence of any illegitimate purpose behind the 1968 provision.[14]

B. Petitioners' Equal Protection Theory Cannot Possibly Succeed.

Petitioners' equal protection theory is inconsistent with settled law and devoid of record support.

1. Florida's felon disenfranchisement law, like any other State law, is "entitled to a presumption of validity against attack under the Equal Protection Clause." *Parham v. Hughes*, 441 U.S. 347, 351 (1979) (citation omitted). Petitioners' premise is that an ancient law, if alleged to be discriminatory, necessarily suffices to call into question the constitutionality of anything and everything that may have followed in its wake. This approach would likewise run contrary to this Court's instruction that "past discrimination cannot, in the manner of original sin,

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[14] Petitioners' notion that *McCreary* requires more in order to uphold the provision at issue here against constitutional challenge cannot be reconciled with *McCreary*'s own express approval of *McGowan v. Maryland*, 366 U.S. 420 (1961), for teaching that "Sunday closing statutes [should be upheld] on practical, secular grounds [upon] finding that the government had forsaken the religious purposes behind centuries-old predecessor laws." *McCreary*, 125 S. Ct. at 2733-34 (citation omitted). *McGowan* demanded no more than what the court below did here: It canvassed the secular justifications generally accepted in support of such laws, *see McGowan*, 366 U.S. at 450-51, and observed that "[t]he existing Maryland Sunday laws [we]re not simply verbatim re-enactments of their religiously-oriented antecedents," and had been the object of "[c]ontemporary concern . . . [as] evidenced by the dozen changes made in 1959 and by the recent enactment of the majority of exceptions" to the law. *Id.* at 448-49.

condemn governmental action that is not itself unlawful." *City of Mobile v. Bolden*, 446 U.S. 55, 74 (1980).[15]

Petitioners disregard these fundaments, arguing that "it only makes sense for the state to bear the evidentiary burden[] in proving" that it has purged any discriminatory intent behind a predecessor law in order to defend the constitutionality of an existing law. Pet. 26. Nonsense. The opinion below explained what petitioners' theory contemplates: the 1968 provision would fall absent affirmative proof by the State "that it acknowledged that racial discrimination tainted the 1868 provision, and yet it knowingly reenacted the disenfranchisement provision for non-discriminatory reasons in 1968." Pet. App. 21a. This standard would be virtually impossible for the State to meet. Given that "[p]rior to this case, no expert had ever suggested that the 1868 disenfranchisement provision was motivated by racial discrimination," how would "present day legislators . . . be aware of the past discrimination" that they must renounce in order to insulate the successor law from petitioners' "original sin" theory of unconstitutionality? Pet. App. 21a n.21. Rather than account for these points, the Petition studiously ignores them.

2. Even if this case turned on the historical origins of predecessors to Florida's 1968 disenfranchisement provision

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[15] This is not to say that evidence of discriminatory intent behind a predecessor law cannot be invoked to support a challenge under the Equal Protection Clause. A plaintiff challenging a race-neutral law may invoke past discrimination as circumstantial evidence to show that racism motivated the "present-day acts" of the decision-makers who actually enacted that law at issue. *United States v. Marengo County Comm'n*, 731 F.2d 1546, 1567 (11th Cir. 1984). Petitioners here expressly stipulated, however, that there was no evidence, circumstantial or otherwise, of any discriminatory intent at work in 1968. What happened in 1868 is, therefore, categorically irrelevant to the intent behind the present-day law.

and not the legitimate intent behind the law itself, petitioners' equal protection theory would still fail and the court below was right to reject it.

To begin with, petitioners' fixation upon the 1868 Constitution as the supposed origin of felon disenfranchisement in Florida is misplaced. As explained, felon disenfranchisement in Florida actually began with "Florida's earliest Constitution, adopted in 1838, [which] authorized the General Assembly to enact criminal disenfranchisement laws," which the General Assembly proceeded to do in 1845. Pet. App. 6a. "At that time, the right to vote was not extended to African Americans, and, therefore, they could not have been the targets of any disenfranchisement law." Pet. App. 7a. Petitioners' equal protection claim and the historical exegesis upon which it relies conspicuously fail to account for this.

Nor do petitioners have persuasive evidence of a discriminatory intent behind the enactment of Florida's felon disenfranchisement provision in 1868. Their claimed proof on this point is ultimately deficient in any number of respects. In order to survive a summary judgment motion, petitioners must have some evidence of discriminatory intent, but the Eleventh Circuit emphasized that petitioners "introduced *no contemporaneous evidence* showing that racial discrimination motivated the adoption of [Florida's] 1868 [disenfranchisement] provision." Pet. App. 18a (emphasis added); *see also id.* at 9a. The court of appeals catalogued the other deficiencies with petitioners' arguments:

- Petitioners' "own historical expert conceded that prior to the instant case, no historian who had studied Florida's 1868 Constitution had ever contemplated that the 1868 criminal disenfranchisement provision was enacted with discriminatory intent." Pet. App. 9a.

- Petitioners' supposed proof of a discriminatory intent behind the felon disenfranchisement provision in fact relates to "certain other provisions in Florida's 1868 Constitution such as a legislative apportionment scheme." Pet. App. 8a; *see* Pet. App. 10a & n.11.
- "Furthermore, Florida did not act alone in choosing its Constitution – the United States Congress expressly approved Florida's 1868 Constitution in readmitting the State to the Union." Pet. App. 10a.

Thus, there is no evidence of a discriminatory intent behind the predecessors to the provision at issue, and no meaningful prospect that a decision by this Court accepting petitioners' legal theory would alter the ultimate result in this case.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied. Alternatively, the Court should grant plenary review only as to the first question presented.

October 14, 2005

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IN THE

Supreme Court of the United States

THOMAS JOHNSON, *et al.*,

Petitioners,

v.

JEB BUSH, Governor of Florida, *et al.*,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

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The Opposition to Certiorari only underscores that each question presented in the Petition demands review. Respondents acknowledge, as they must, that the circuits are divided on whether the Voting Rights Act reaches felony disenfranchisement. Opp. at 5. As to the constitutional question, lower courts and litigants need guidance in determining when a reenactment salvages a policy tainted by an improper purpose and persistent discriminatory effects.

Respondents warn the Court to avoid "cast[ing] into doubt the criminal justice system of 48 States." Opp. at 1. Yet Florida does not keep company with 47 other states in its anti-democratic practices. Only two others (Kentucky and Virginia) permanently disenfranchise all people with felony convictions who have not received discretionary executive clemency. Florida is the nation's leading disenfranchiser. Of the 4.7 million Americans who have lost the right to vote because of a criminal conviction, 827,000 live in Florida.[1] Three-quarters of them—Petitioners here—have fully served their felony sentences and put the criminal justice system behind them, but remain political outcasts. They deserve a chance to prove at trial that Florida's voting ban violates the Voting Rights Act and the 15th and 14th Amendments.

I. Respondents Misstate the Summary Judgment Record.

1. Contrary to Respondents' assertions, Opp. at 3, 29-30, the summary judgment record is replete with contemporaneous evidence of racism behind Florida's 1868 felony disenfranchisement provision. One of Petitioners' expert reports details the obsession of Florida's prevailing Reconstruction leaders with constraining the political power of freedmen. Shofner Rep. (App. 197a-254a). Toward this end, the 1868 Constitution provided several tools for eviscerating such power. A skewed legislative apportion-

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[1] The Sentencing Project, *Felony Disenfranchisement Laws in the United States* (2005), http://www.sentencingproject.org/pdfs/1046.pdf; Uggen Rep. (App. 259a, 296a).

ment provision diluted the representation of counties where freed slaves were concentrated, while inflating the representation of white counties. Another provision empowered the governor to appoint local officials, precluding their election by local black majorities. As a Moderate Republican delegate wrote during the convention, "the Judiciary and State officers will be appointed & the apportionment will prevent a negro legislature." *Id.* (App. 222-24a).[2] In addition, for the first time, the Florida Constitution of 1868 disenfranchised all persons convicted of felonies. (App. 190a). Later that year, the legislature expanded the list of felonies and designated vagrancy, and other "crimes" intended to address "the altered condition of the colored race," as among the many that would trigger disenfranchisement. Shofner Rep. (App. 207-08a, 224-26a, 229-30a). These measures had the expected result. A captain in the Florida convict camps at the time estimated that 95% of the convicts in the 1870s and '80s were black. *Id.* (App. 234a).

2. Respondents charge that Petitioners have shown nothing beyond "mere disparate impact." Opp. at 18. On the contrary, Petitioners' summary judgment evidence demonstrates not only racial animus behind the felony disenfranchisement provision, but also a long history of both intentional and structural race discrimination in the criminal justice system, the clemency process, the franchise, and the purging of the voter rolls—all contributing to racial disparities in felony disenfranchisement.[3] If allowed to make

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[2] The State's clear intention to suppress the black vote through these other provisions is highly probative of the same intent in the same convention's contemporaneous adoption of the felony disenfranchisement provision. *See Keyes v. Sch. Dist. No. 1*, 413 U.S. 189, 207 (1973) ("[A] finding of illicit intent as to a meaningful portion of the item under consideration has substantial probative value on the question of illicit intent as to the remainder.").

[3] *See* Shofner Rep. (App. 197-254a); Uggen Rep. (App. 255-300a); Uggen Add. (App. 301a); Uggen Supp. (App. 361-73a); Chiricos Rep. (App. 310-60a); Pet. at 4-7, 19-20.

their case at trial, Petitioners will show through this and other evidence that African Americans are disproportionately disenfranchised under the law at issue, not because they commit more crimes than others, but because they are particular targets of both law enforcement and vote suppression.

II. The Court Should Grant Review to Resolve the Circuit Split on Whether § 2 of the Voting Rights Act Applies to Felony Disenfranchisement.

Respondents concede that the courts of appeals are split on whether § 2 of the Act applies to felony disenfranchisement. Opp. at 5. This question requires resolution.

Dire predictions of a flood of insubstantial § 2 cases notwithstanding, Opp. at 17, a decision for Petitioners here would not throw open the courthouse doors. Section 2 is not a *per se* prohibition, but forbids only "qualification[s] . . . which result[] in a denial . . . of the right . . . to vote on account of race." 42 U.S.C. § 1973 (2005). It subjects such qualifications to a "totality of the circumstances" test, requiring pragmatic application of the "Senate factors" to determine whether a qualification that has a disparate impact on racial minorities also results in the denial of the right to vote "on account of race." *Id.*; *Thornburg v. Gingles*, 478 U.S. 30, 43-45 (1986).[4] The record in this case contains ample evidence of the interaction of Florida's felony disenfranchisement provision with discrimination in voting and other areas of public life. *Supra* Point I. And the amicus briefs demonstrate the tenuousness of the policies generally offered to support felony disenfranchisement laws.[5]

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[4] *See* S. Rep. No. 97-417, at 33 (1982), *reprinted in* 1982 U.S.C.C.A.N. 177, 211 (results test of § 2 "d[oes] not assure victory for plaintiffs," who must still establish race discrimination in totality of circumstances).

[5] *See* Brief for Amici Curiae Nat'l Black Police Ass'n et al.; Brief for Amicus Curiae League of Women Voters of Fla.

Respondents disregard the plain text of § 2 in contending that its comprehensive language excludes felony disenfranchisement, unless it is intentionally discriminatory, in which case it is covered. Opp. at 8 n.4. They explain this contorted interpretation by positing constitutional obstacles to the exercise of Congress's enforcement power. These impediments vanish upon inspection.

A. The 15th Amendment Controls.

Respondents assert that applying the results test of § 2 to felony disenfranchisement would encroach upon authority reserved to the states. Opp. at 15. But the 15th Amendment was enacted specifically to recast the state-federal balance of power with respect to denials of the franchise on account of race. As this Court recognized just five years after its passage, "Previous to this amendment, there was no constitutional guaranty against this discrimination [in the franchise]: now there is." *United States v. Reese*, 92 U.S. 214, 218 (1875). Because the application of § 2 of the Voting Rights Act to felony disenfranchisement is consistent with the state-federal balance already struck by the 15th Amendment, the clear statement rule of *Gregory v. Ashcroft*, 501 U.S. 452, 460 (1991), does not apply here.

Respondents argue that the Penalty Clause of the 14th Amendment prevents Congress from reaching any felony disenfranchisement provision not born of racial animus. The 15th Amendment repudiates any such limit. Its specific ban on race discrimination in voting more directly controls this case than the 14th Amendment's general guarantee of equal protection. *See Graham v. Connor*, 490 U.S. 386, 394-95 (1989). Because it was enacted later, the 15th Amendment takes precedence over inconsistent provisions of the 14th. *See Seminole Tribe v. Florida*, 517 U.S. 44, 65-66 (1996). And Congress considered and rejected proposed versions of the 15th Amendment that explicitly exempted felony

disenfranchisement. Pet. at 15.[6] Whatever its effect on enforcement of the 14th Amendment,[7] the Penalty Clause simply does not limit Congress's power to enforce the 15th Amendment, including its power to prohibit race discrimination in voting that may not itself be demonstrably unconstitutional.[8] This power extends to felony disenfranchisement as to all other voting qualifications.

B. More Specific Findings Are Unnecessary.

Finally, Respondents charge Congress with neglecting an ostensible constitutional obligation to make specific findings regarding felony disenfranchisement. Opp. at 8. This charge has no basis. This Court has never demanded that Congress identify in advance every discriminatory tactic it intends to redress. Comprehensive remedial legislation would be impossible if Congress were forced to act as a court, condemning discriminatory tactics one by one on particularized findings of guilt, rather than as a legislature, responding to broader patterns of state discrimination.[9]

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[6] Contrary to Respondents' suggestion, Opp. at 11 n.6, it is immaterial whether the rejected exemptions were embedded in proposals that would have expanded the Amendment's protections beyond race. In the end, Congress banned race discrimination in voting without an exception for felony disenfranchisement; there is therefore no basis for the Court to imply an exception here.

[7] This Court has held that the 14th Amendment prohibits racially discriminatory felony disenfranchisement, notwithstanding the Penalty Clause. *Hunter v. Underwood*, 471 U.S. 222, 233 (1985).

[8] *See Lopez v. Monterey County*, 525 U.S. 266, 282-83 (1999) (Congress has the power under the 15th Amendment to "'prohibit voting practices that have only a discriminatory effect.'" (quoting *City of Rome v. United States*, 446 U.S. 156, 175 (1980))).

[9] As this Court recognized just last term in an analogous context, it "is not only unprecedented, it is also impractical" to require Congress to make "detailed findings proving that each activity regulated within a comprehensive statute is essential to the statutory scheme." *Gonzales v. Raich*, 125 S. Ct. 2195, 2208 n.32 (2005).

Instead, in assessing remedial legislation, this Court has required that Congress find a pattern of violations of the constitutional *right* at issue sufficient to justify legislation that reaches beyond what the Constitution mandates. Thus, for example, Congress's failure to find unconstitutional religious discrimination doomed the Religious Freedom Restoration Act, *City of Boerne v. Flores*, 521 U.S. 507, 530-31 (1997), while findings of unconstitutional gender discrimination in leave policies sufficed to uphold the Family and Medical Leave Act, *Nev. Dep't of Human Res. v. Hibbs*, 538 U.S. 721, 728-31 (2003). Similarly, Congressional findings of unconstitutional incursions on the fundamental right of access to the courts supported the relevant applications of the Americans with Disabilities Act, *Tennessee v. Lane*, 541 U.S. 509, 523, 527-28 (2004), but the same legislative record revealed insufficient constitutional violations to uphold the Act's protections of the non-fundamental right to public employment, *Bd. of Trs. of the Univ. of Ala. v. Garrett*, 531 U.S. 356, 370-71 (2001).

This Court has repeatedly characterized the legislative record supporting the Voting Rights Act as the paradigm of a "serious pattern of constitutional violations" by the states. *Garrett*, 531 U.S. at 373 (citing *South Carolina v. Katzenbach*, 383 U.S. 301, 308 (1966)).[10] Congress found that this pattern would continue without strong prophylactic legislation. *See* H.R. Rep. No. 89-439, at 9-11 (1965), *reprinted in* 1965 U.S.C.C.A.N. 2437, 2439-42. This record more than justifies the comprehensive remedial scope of § 2. The statute therefore reaches any course of state conduct that may violate its terms, with no implied exception for permanent felony disenfranchisement.

Nothing in Justice Black's opinion in *Oregon v. Mitchell*, 400 U.S. 112 (1970), striking down a federal minimum

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[10] *See also City of Boerne*, 521 U.S. at 530; *United States v. Blaine County*, 363 F.3d 897, 905-07 (9th Cir. 2004).

County by emphasizing the passage of time since 1868, Opp. at 25-27, but a discriminatory taint persists until the link is affirmatively broken, even eighty years later. *See Hunter*, 471 U.S. at 233. The passage of time may allow a state more easily to establish a legitimate reason for a reenactment, but it does not eliminate this requirement.[11]

Respondents also seek to discredit this straightforward shift in the evidentiary burden by exaggerating what it requires. It is not that a discriminatory law "necessarily suffices to call into question the constitutionality of anything and everything that may have followed in its wake." Opp. at 27. It is not that a state must confess and repent the illicit intent of a prior provision. Opp. at 28. Rather, this Court has required that a state demonstrate that it had a legitimate reason for reenacting a tainted policy. This demand is hardly onerous, but Respondents have failed to meet it here.

B. The Lower Courts Are in Disarray.

Respondents fail to rationalize and harmonize the lower courts' decisions. Those courts have not recognized that the reenactment of a tainted policy is a distinct problem with a clear resolution. Without directly acknowledging the issue, the Fifth Circuit has asked whether the government articulated a valid reason upon reenacting a tainted policy. *See Chen v. City of Houston*, 206 F.3d 502, 520-21 (5th Cir. 2000).[12] The Eleventh Circuit does not. App. 20-25a. The

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[11] Thousands of older members of the Plaintiff class have directly experienced the continuity of Florida's policy: They were disenfranchised under the 1868 provision, and its reenactment in 1968 provided no new, valid reason for their continuing second-class citizenship.

[12] As Respondents note, *Chen* states that despite a once-tainted policy, an "intervening reenactment with meaningful alterations may render the current law valid." *Id.* at 521; Opp. at 22. If the reenacting body explains its legitimate reason for such a reenactment, as Houston did, there is no dispute that the policy may stand. *See Chen*, 206 F.3d at 520 (noting "that the City's plans were independently substantially justified by

Fourth Circuit has recognized the issue but declined to decide it. *Irby v. Va. State Bd. of Elections*, 889 F.2d 1352, 1355 (4th Cir. 1989). This Court should clarify the governing principle.

C. This Case Squarely Presents the Issue.

Respondents maintain that this case does not actually involve the reenactment of a tainted policy. They claim that, because criminal disenfranchisement in Florida predates African-American voting rights, the 1868 provision could not have been adopted with racist intent. Opp. at 29. Not so. Poll taxes predated the extension of the franchise, but were turned to illegitimate ends when the franchise was extended; so, too, with felony disenfranchisement laws.[13]

Second, Respondents claim that the 1868 felony disenfranchisement provision was meaningfully amended, rather than merely reenacted, in 1968. Again, not so. Florida's current felony voting ban (Fla. Const. art. VI, § 4 (App. 192a)) is the same as its 1868 ban (Fla. Const. of 1868, art. XIV, § 2 (App. 190a)), and is expressed in virtually identical language: citizens with felony convictions are barred from the polls for life, unless the executive chooses to restore their rights. Pet. at 9 n.5. The only change in 1968 was the omission of a separate and largely redundant provision (Fla. Const. of 1868, art. XIV, § 4 (App. 190a)) that directed the legislature to disenfranchise people based on certain enumerated and "infamous" crimes, including some

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traditional [race-neutral] districting factors"); *Hunter*, 471 U.S. at 228. But Florida has offered no reason for its 1968 reenactment.

[13] *See* J. Morgan Kousser, *Poll Tax, in International Encyclopedia of Elections* 208-09 (Richard Rose et al. eds., 2000) (noting the 18th-century history and later discriminatory use of the poll tax); *McLaughlin v. City of Canton*, 947 F. Supp. 954, 969-70, 976-78 (S.D. Miss. 1995) (reviewing the pre-Civil War history of criminal disenfranchisement in Mississippi, and evidence of its later discriminatory expansion); *cf. Irby*, 889 F.2d at 1354-56 (reviewing the race-neutral history of appointment of local school board officials and its later discriminatory application).

misdemeanors. The felony disenfranchisement provision, however, stands unchanged—in its intent, its terms, and its consequences.

Finally, Respondents claim—at least five times—that Petitioners conceded the absence of "any illegitimate purpose behind the 1968 provision." Opp. at 27; *see also id.* at 2, 19, 20, 28 n.15. Petitioners, however, did *not* concede that the 1968 provision was free of discriminatory intent. Petitioners acknowledged only that there is no evidence *in the R.H. Gray state archives* that race was considered in 1968. Pet. at 5.

This final quibble is a distraction, for it is premised on the wrong question. The real issue is whether, once Petitioners have shown a tainted history and continuous discriminatory impact, the State must prove that it had a legitimate reason to reenact its permanent felony disenfranchisement provision. This void cannot be filled by passing reference to the "penal laws," Opp. at 15 n.8, the existence of an "extensive deliberative process [of indeterminate content]" in the legislature, *id.* at 3, or the invocation of "an important [but unspecified] racially neutral public policy," *id.* at 16. Yet Respondents offer nothing more. This case turns on the allocation of the burden of proof; it therefore offers an excellent vehicle for this Court to clarify the issue.

CONCLUSION

For these reasons and those in the Petition, Petitioners respectfully request that this Court grant a writ of certiorari.

Dated: October 25, 2005

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In The

Supreme Court of the United States

Thomas Johnson, *et al.*,

Petitioners,

v.

Jeb Bush, Governor of Florida, *et al.*

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

BRIEF OF *AMICUS CURIAE* LEAGUE OF WOMEN VOTERS OF FLORIDA IN SUPPORT OF PETITIONERS

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S. Rep. No. 97-417 (1982) 4, 5, 6, 10

STATEMENT OF INTEREST

The League of Women Voters is a nonpartisan political organization that encourages political responsibility through informed and active participation of citizens in government. See League of Women Voters, *About the League*, http://www.lwv.org/AM/Template.cfm?Section=About_Us (last visited Oct. 11, 2005). Founded in 1920 at the National American Woman Suffrage Association convention, the League of Women Voters is premised on the conviction that no American citizen should be restricted from voting merely because of his or her status. Today, in addition to the national organization in Washington, D.C., fifty state Leagues, and nearly nine hundred local Leagues work to empower American citizens and to "encourage people to vote." *Ibid.*

Amicus, the League of Women Voters of Florida ("LWVF"), is the national League's Florida affiliate, established in 1939, and currently comprised of 3,200 members. The LWVF has long taken the position that Florida's policy of lifetime disenfranchisement for persons convicted of a felony is inconsistent with the League's commitment to universal citizen enfranchisement. LWVF has filed this brief *amicus curiae* in support of the petition for certiorari as part of its ongoing effort to change Florida's policy and to restore voting rights to the 613,000 Florida citizens who have completed their felony sentences now barred from full civic participation.[1]

LWVF is a charter member of the Florida Rights Restoration Coalition ("FRRC"), an umbrella group of voting- and civil-rights organizations founded in March 2003

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[1] The parties have consented to the filing of this brief. Their letters of consent have been filed with the Clerk of this Court. Pursuant to this Court's Rule 37.6, *amicus* states that none of the parties or their counsel wrote the brief in whole or in part and that no one other than *amicus*, its members, and counsel made any monetary contribution to the preparation or submission of the brief.

with the goal of planning and implementing "grassroots legislative initiat[ives] geared toward the restoration of rights to former felons." FRRC, Florida Rights Restoration Coalition Activities (2005). FRRC is comprised of over forty non-partisan statewide organizations, including the Florida Council of Churches, the Florida Voters League, the Miami-Dade Election Reform Coalition, and the YWCA of Greater Miami.

LWVF, in concert with FRRC, has developed a number of programs with the ultimate goal of restoring voting rights to Florida citizens who have paid their debts to society and have fully completed their sentences. First, FRRC has been seeking legislative change. FRRC members arrange meetings with state legislators at which persons "directly and/or indirectly affected by Florida's voting and civil rights ban" – such as a formerly convicted citizen, a family member of an ex-felon, or a social service provider – can explain the harmful impact of Florida's current laws and procedures. See FRRC, FRRC Action Plan (Draft) (2005). In addition, FRRC provides information to legislators "as to why restoration of voting and civil rights should be automatic after completion of the sentence." *Ibid.*

Second, LWVF members have been working to ameliorate the effects of Florida's disenfranchisement law by helping ex-felons to navigate the state's existing restoration policy. To restore their rights, Florida citizens with past felony convictions must complete a "Restoration of Civil Rights" ("RCR") application and then hope that the Governor and the Executive Clemency Board use their unlimited discretion to grant restoration. The LWVF believes the restoration process lacks accountability and oversight; the Governor and Clemency Board do not even have to provide the applicant with a reason for denial. Not only is the process complicated and often fruitless, but it is also inaccessible to many former offenders. Although state law requires the Department of Corrections to assist incarcerated offenders with the RCR application prior to their release, the

Department of Corrections often fails to inform inmates of the clemency process. Only recently, in response to a lawsuit brought by the Florida Caucus of Black Legislators, did the courts restore voting rights to several thousand people who had not been informed of their rights in the clemency process. See *Florida Caucus of Black State Legislators, Inc.* v. *Crosby*, 877 So. 2d 861 (Fla. Dist. Ct. App. 2004).

Recognizing that many ex-felons are still unaware of their rights in the clemency process, FRRC hosted ten step-by-step workshops across Florida in July 2003 to assist citizens with past felony convictions in applying for restoration. Overall, 210 volunteers from local FRRC organizations, including LWVF, assisted over 660 people with completing applications.[2] FRRC then forwarded the applications to the Office of Executive Clemency in Tallahassee, with the hope that these Florida citizens would finally have an opportunity to once again achieve full citizen status. Nonetheless, LWVF recognizes that the workshops are too limited a device for full restoration and that the RCR process is arbitrary, uncertain, and inaccessible at best. For these reasons, LWVF believes that until Florida's law provides for automatic restoration of voting rights for former offenders, thousands of black Florida citizens will continue to be denied one of their most fundamental rights.

SUMMARY OF ARGUMENT

Congress enacted the Voting Rights Act ("VRA") in 1965 to bring disenfranchised African-American voters into the political process. As this Court recently recognized, the "purpose of the Voting Rights Act is to prevent discrimination in the exercise of the electoral franchise and to foster our transformation to a society that is no longer fixated on race." *Georgia* v. *Ashcroft*, 539 U.S. 461, 490 (2003). Florida's lifetime felon disenfranchisement law stands as a

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[2] Even this significant number represents only one-tenth of one percent of the plaintiff class.

direct obstacle to that congressionally mandated transformation by continuing to disenfranchise large numbers of African-American voters.

This Court should grant certiorari to make clear that plaintiffs can challenge felon-disenfranchisement provisions, under section 2 of the VRA, just as they can challenge any other "voting qualification" that "results in a denial or abridgement of the right of any citizen of the United States to vote on account of race or color." 42 U.S.C. 1973(a). Florida's lifetime disenfranchisement of persons convicted of a felony is precisely such a qualification. The law's disparate impact is undeniable: although African Americans constitute only 13.6% of the state's voting-age citizens, 27.3% of the more than 613,000 ex-felons who are disenfranchised after completing their sentences are black; approximately 10.5% of the state's adult black population is disenfranchised, compared with 4.4% of the non-black population.

Section 2 directs courts to consider "the totality of circumstances" in reviewing a challenged "voting qualification." 42 U.S.C. 1973(b). Congress identified one of those circumstances as whether "the policy underlying the * * * voting qualification" is "tenuous." S. Rep. No. 97-417, at 29 (1982).

Under controlling constitutional doctrine, the traditional justifications for lifetime felon disenfranchisement laws are not merely "tenuous": they are constitutionally impermissible. States are no longer permitted to deny someone the right to vote based on assumptions that he or she will vote in ways that a majority considers "anti-social" or "subversive" of the existing order. Nor can a state justify stripping an individual permanently of the right to vote by claiming that it is a valid or proportional form of punishment.

Not only are the proffered justifications for lifetime felon disenfranchisement tenuous at best, but such practices actually undermine important goals of the criminal justice and political processes. Empirical evidence suggests that lifetime

felon disenfranchisement laws increase recidivism rates among ex-felons and suppress voting rates among law-abiding citizens in communities where large numbers of ex-felons reside. Conversely, restoration of voting rights reduces recidivism and encourages citizens in historically underrepresented communities to exercise their civic duty through the ballot box.

ARGUMENT

I. FLORIDA'S PROVISION DIRECTLY IMPEDES THE CENTRAL GOAL OF THE VOTING RIGHTS ACT: FULL PARTICIPATION OF MINORITY CITIZENS IN THE POLITICAL PROCESS.

1. A central purpose of the Voting Rights Act of 1965 was to eliminate the legal barriers that have prevented African Americans from participating fully and equally in the political process. The Congresses that enacted and amended the Voting Rights Act were particularly concerned with restrictive registration practices, ranging from literacy tests and poll taxes to so-called "good character" requirements and voter purges. S. Rep. No. 97-417, at 5 (1982) (hereafter "Senate Report");[3] S. Rep. No. 94-295, at 12 (1975); H.R. Rep. 91-397, 1970 U.S.C.C.A.N. 3277, at 3281 (1969).

Congress expressed that concern not only by enacting and amending section 2 – the provision directly at issue in this case – but also by creating a system of extraordinary remedies for jurisdictions with a particularly pervasive history of discriminatory disenfranchisement. The "preclearance" regime of section 5 of the Act, 42 U.S.C. 1973c, requires covered jurisdictions to seek federal approval of any change in their voting laws because Congress feared that any gains in

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[3] The 1982 Senate Report constitutes the "authoritative source for legislative intent" behind the amended Voting Rights Act. *Thornburg* v. *Gingles*, 478 U.S. 30, 43 n.7 (1986).

minority registration or participation would otherwise be wiped out. Senate Report, *supra*, at 5-6.

One of the two triggers for section 5 coverage is set out in section 3(c) of the Act, 42 U.S.C. 1973a(c). That provision permits federal courts to order, as part of the remedy in a case finding violations of the Fourteenth or Fifteenth Amendments, that a jurisdiction be covered by the preclearance requirement. To the best of *amicus*'s knowledge, Escambia County, Florida, is one of only six jurisdictions in the entire United States where a federal court has ordered this extraordinary remedy. See *McMillian* v. *Escambia County*, 559 F. Supp. 720, 727 (N.D. Fla. 1983) (referring to the imposition of preclearance).

Nationwide, the Voting Rights Act has done much to eliminate the barriers to registration and participation previously faced by minority citizens. "More than a million black citizens were added to the voting rolls from 1965 to 1972. It is not surprising, therefore, that to many Americans, the Act is synonymous with achieving minority registration." Senate Report, *supra*, at 6. As this Court has noted, "the spread between black and white registration in several of the targeted Southern States [has] fallen to well below 10%." *Shaw* v. *Reno*, 509 U.S. 630, 640 (1993). Today, black registration rates nationwide are comparable to white registration rates: in 2004, 64.4% of black citizens were registered, compared with 67.9% of white citizens. U.S. Census Bureau, *Reported Voting and Registration of the Total Voting-Age Population, by Sex, Race and Hispanic Origin, for States: November 2004* (May 25, 2005), *available at* http://www.census.gov/population/www/socdemo/voting/cps2004.html (last visited Oct. 11, 2005).

2. Unfortunately, the Voting Rights Act has been less successful in enfranchising Florida's black citizens. Today, only 52.6% of black Floridians are registered to vote, compared with 64.4% of blacks nationwide. *Ibid.* Similarly, only 44.5% of black Floridians cast a ballot in the 2004

election, compared to 56.3% of black citizens of voting age nationwide. *Ibid.* This lower voting and registration rate for African Americans living in Florida reflects Florida's history of racial discrimination.

The courts below recognized the "abundance" of evidence regarding that history. See Pet. App. 159a. That history involves not only the provision at issue in this case, which clearly had its genesis in the desire to perpetuate an all-white electorate after the end of the Civil War, but also such other well-recognized stratagems as barring black voters from primaries, see *Miami Chronology: 1920-1940*, Miami Herald, Sept. 13, 2002, *available at* http://www.miami.com/mld/miamiherald/news/photos/4069508.htm (last visited Sept. 25, 2005) and poll taxes, see Alexander Keyssar, The Right To Vote 228-29 (2000).

The continued effects of Florida's long history of racial discrimination with regard to voting are visible today. Most dramatically, the 2000 presidential election displayed in stark relief Florida's continued difficulty with providing equal access to the voting booth for its African-American citizens. As the U.S. Commission on Civil Rights reported, the "disenfranchisement of Florida voters fell most harshly on the shoulders of African Americans," who were "nearly 10 times more likely than white voters to have their ballots rejected in the November 2000 election." U.S. Commission on Civil Rights, *Voting Irregularities in Florida During the 2000 Presidential Election* (June 2001), *available at* http://www.usccr.gov/pubs/vote2000/report/main.htm (citation omitted) (last visited Oct. 11, 2005).

While not all of this discrimination was intentional, some surely was. On Election Day, "Florida Highway Patrol troopers conducted an unauthorized vehicle checkpoint within a few miles of a polling place in a predominately African American neighborhood," while other voters reported seeing state troopers in and around polling places. *Ibid.* Such behavior sends a threatening signal to populations of voters

who already have entrenched suspicions of law enforcement as a result of past discrimination.

Although Florida's rates of felon disenfranchisement are far higher than those of other states, see Jamie Fellner & Marc Mauer, *Losing the Vote: The Impact of Felony Disenfranchisement Laws in the United States* (1998), *available at* http://www.hrw.org/reports98/vote/ (last visited Oct. 11, 2005), felon-disenfranchisement statutes are nonetheless a national problem meriting this Court's review. The magnitude of the problem is illustrated by the fact that in the 1996 presidential election, nearly 1.4 million black men nationwide were denied the right to vote because of such laws. *Ibid.* This significantly exceeds the number of black men (roughly 1.1 million) who were *enfranchised* by the passage of the Fifteenth Amendment in 1870. Bureau of the Census, *Historical Statistics of the United States: Colonial Times to 1970* 17 (1975) (in 1870 there were approximately 1,083,484 black men in the United States over the age of 20).

Moreover, the continued disenfranchisement of large numbers of African-American citizens affects citizens other than the individual denied the right to vote. It also contributes to the dilution of minority voting power. For instance, African-American voters in Florida have rarely been able to elect black candidates: whereas 12.7% of Florida's voting-age population is black, only 4.3% of the state's elected officials are black. David A. Bositis, *Black Elected Officials: A Statistical Summary 2001*, Joint Ctr. for Political & Econ. Studies (2003), at 16 tbl.3, *available at* http://www.jointcenter.org/publications1/publication-PDFs/BEO-pdfs/2001-BEO.pdf (last visited Oct. 11, 2005).[4]

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[4] That racial disparities in offender disenfranchisement are not simply a southern problem is illustrated by cases such as *Farrakhan* v. *Washington*, 338 F.3d 1009 (CA9 2003), cert. denied, 125 S.Ct. 477 (2004), and *Muntaqim* v. *Coombe*, 366 F.3d 102 (CA2 2004), cert. denied, 125 S.Ct. 480 (2004), rehearing en banc granted, 396 F.3d 95 (CA2 2004), challenging the offender

II. THE PROFFERED JUSTIFICATIONS FOR LIFETIME FELON DISENFRANCHISEMENT LAWS ARE SO TENUOUS THAT THEY DO NOT SATISFY THE VOTING RIGHTS ACT.

Section 2 of the Voting Rights Act prohibits the imposition by a State or political subdivision of "a voting *qualification* or prerequisite to voting or standard, practice, or procedure," if such imposition would "result[] in a denial or abridgement of the right of any citizen of the United States to vote on account of race or color," 42 U.S.C. 1973(a) (emphasis added). The plain language of section 2 thus reaches felon disenfranchisement laws. See *Farrakhan* v. *Washington*, 338 F.3d 1009, 1016 (CA9 2003) ("Felon disenfranchisement is a voting qualification, and Section 2 is clear that *any* voting qualification that denies citizens the right to vote in a discriminatory manner violates the VRA.") (citation omitted) (emphasis in original), cert. denied, 125 S. Ct. 477 (2004).

Section 2 further directs courts to consider whether under "the totality of the circumstances," a challenged practice results in discrimination on account of race. 42 U.S.C. 1973(b). In the authoritative Senate Report

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disenfranchisement policies of Washington and New York, respectively. *Amicus* believes this Court appropriately denied certiorari in *Farrakhan*, which was correctly decided by the Ninth Circuit, and should grant certiorari here to make clear that offender disenfranchisement statutes are subject to attack under the VRA when they have a discriminatory result. This case may offer a better vehicle than *Muntaqim* for addressing the question. First, New York's law only disenfranchises currently incarcerated felons and parolees. The risk of discriminatory effects is far greater under Florida's lifetime disenfranchisement system, and therefore the question of whether the VRA applies to felon disenfranchisement laws is more starkly presented. Moreover, the justification for the state's policy is, for reasons we discuss, far more tenuous. Second, the unique procedural posture in which *Muntaqim* would come before this Court might preclude reaching the substantive issue.

accompanying the 1982 amendments that imposed this "results test," Congress identified a number of "typical factors" that may be relevant in assessing a section 2 claim.

Of particular salience to this case, Congress directed courts to consider "[w]hether the policy underlying the state or political subdivision's use of such voting qualification * * * is tenuous." Senate Report, *supra*, at 29. When a state's proffered justifications for using a practice that deprives minority citizens of the right to participate and to elect representatives of their choice are tenuous, this "casts the [state's] scheme in a dubious light," *Hendrix* v. *Joseph*, 559 F.2d 1265, 1269 (CA5 1977). Not only can the tenuousness of a state's articulated rationale be "circumstantial evidence that the system is motivated by discriminatory purposes," it is also relevant to the question whether the policy is so "unfair" that it fails section 2's totality of the circumstances test. *United States* v. *Marengo County*, 731 F.2d 1546, 1571 (CA11 1984).

The traditional justifications for lifetime felon disenfranchisement laws are worse than tenuous. Under contemporary constitutional doctrine, they are themselves constitutionally problematic. Whatever the state of the law at the time of *Richardson* v. *Ramirez*, 418 U.S. 24 (1974), there has been a sea change since. That change is reflected in the fact that while twenty-eight states inflicted lifetime disenfranchisement at the time of *Richardson*, today only three states still deny the right to vote to all individuals who have completed their sentences. See The Sentencing Project, *Felony Disenfranchisement Laws in The United States* 3 (2005), *available at* http://www.sentencingproject.org/pdfs/1046.pdf (last visited October 11, 2005). Florida is thus an outlier relying, to the extent it tries to justify its policy at all, on outmoded and constitutionally dubious reasoning.

A. States May Not Disenfranchise Groups of Citizens on the Basis of the Policies or Candidates Those Voters May Support.

The most widely advanced basis for disenfranchising former offenders is that they lack the moral character to vote and, if re-enfranchised, might use the ballot box to oppose law-enforcement policies. See Fellner & Mauer, *supra*, at 1. Traditionally, supporters of lifetime felon disenfranchisement justified the practice by pointing to a now-discredited concern with preventing the expression of "anti-social" or "subversive" views. This "anti-social voter" justification is based on the assertion that an ex-felon's prior violation "raise[s] questions about [his] ability to vote responsibly." *Shepherd* v. *Trevino*, 575 F.2d 1110, 1115 (CA5 1978). The state is therefore justified in revoking the right of past offenders to vote to protect the "purity of the ballot box," *Washington* v. *State*, 75 Ala. 582, 585 (Ala. 1884) (warning of an "evil infection" and "the invasion of corruption" by the "unfit"), and to ensure that former offenders do not use their power to vote in ways contrary to societal interests. *Green* v. *Bd. of Elections*, 380 F.2d 445, 451-52 (CA2 1967), cert. denied, 389 U.S. 1048 (1968).

This argument – dubious already in its factual premise – is not a justification for denial of the basic right to vote. States in the late nineteenth century similarly justified their efforts to disenfranchise polygamists on the grounds that the state has the prerogative to "withdraw all political influence from those who are practically hostile" to prevailing social mores. *Murphy* v. *Ramsey*, 114 U.S. 15, 45 (1885); see also *Davis* v. *Beason*, 133 U.S. 333 (1890) (same).

Simply put, however, the Constitution no longer permits disenfranchisement on the basis of fear about how people will vote. "To the extent *Davis* held that persons advocating a certain practice may be denied the right to vote, it is no longer good law." *Romer* v. *Evans*, 517 U.S. 620, 634 (1996). See also Stephen Holmes & Cass R. Sunstein, The Cost of Rights:

Why Liberty Depends on Taxes 105 (1999). Because the right to vote is "vital to the maintenance of democratic institutions," a state cannot disenfranchise a sector of the population out of "a fear of the political views" of that political group. *Carrington* v. *Rash*, 380 U.S. 89, 94 (1965) (citation omitted); see also *Dunn* v. *Blumstein*, 405 U.S. 330, 355 (1972) (state may not limit the vote to those with "a common interest"); *Cipriano* v. *City of Houma*, 395 U.S. 701, 705 (1969) ("differences of opinion" may not be the basis for excluding any group or person from the franchise).

Because the anti-social voter justification rests on the unconstitutional philosophy that states can disenfranchise voters based on imagined voting tendencies, Florida must find other non-tenuous justifications for its lifetime disenfranchisement law.[5]

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[5] The tenuousness of the anti-social voter justification is reinforced by the fact that even if former offenders were to vote as a bloc, they would achieve electoral success only if they could persuade a significant proportion of never-convicted voters to support their preferred candidates or issues. Under those circumstances, however, defenders of lifetime disenfranchisement need to explain why the preferences of a majority of the citizenry to change perhaps outdated or otherwise unwise criminal laws should not be respected.

Supporters of lifetime disenfranchisement laws also sometimes argue that because former offenders have violated the law, they have broken the "social contract" that binds all members of a society together, and, as a result, should lose the right to help determine society's political path. *Wesley* v. *Collins*, 791 F.2d 1255, 1261-62 (CA6 1986); Angela Behrens et al., *Ballot Manipulation and the "Menace of Negro Domination": Racial Threat and Felon Disenfranchisement in the United States, 1850-2002*, 109 Am. J. Soc. 559, 571 (2003) (quoting Sen. Mitch McConnell as arguing that "[s]tates have a significant interest in reserving the vote for those who have abided by the social contract. * * * Those who break our laws should not dilute the vote of law-abiding citizens.").

B. Punishment Is Not a Valid Justification for Lifetime Felon Disenfranchisement Laws.

Defenders of lifetime disenfranchisement laws have recently argued that revoking the right to vote is a valid "form of punishment." See, *e.g.*, Roger Clegg, *Who Should Vote?*, 6 Tex. Rev. L. & Pol. 159, 177 (2001); see also Frank Phillips, *Lawmakers Push to Ban Inmate Votes*, Boston Globe, June 28, 2000, at B1 (quoting Massachusetts House Minority Leader Francis Marini as suggesting that the loss of the vote "is part of the penalty"). Indeed, the court of appeals in this case suggested that Florida's disenfranchisement law was intended as a punitive device. *Johnson* v. *Bush*, 405 F.3d 1214, 1228 (CA11 2005) (en banc) ("Felon disenfranchisement laws are * * * a punitive device stemming from criminal law.").

That justification marks a shift in the rationale for disenfranchisement. This Court's decision in *Trop* v. *Dulles* presupposed that disenfranchisement laws represent a "*nonpenal* exercise of the power to regulate the franchise." 356 U.S. 86, 96-97 (1958) (emphasis added). It thought they were to be justified on the anti-social voter theory, or not at all. See *id.* at 97 n.22 (referring to *Davis* v. *Beason*, 133 U.S. 333 (1890), and *Murphy* v. *Ramsey*, 114 U.S. 15 (1885), in support of disenfranchisement laws). There is thus "little

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In fact, the "social contract" rationale ultimately collapses into either an argument that persons convicted of a crime will vote in ways that the state does not like, which is constitutionally illegitimate for the reasons *amicus* has just explained, or an argument that lifetime disenfranchisement constitutes an appropriate punishment. As the next section shows, that rationale is also illegitimate. Cf. John Locke, The Second Treatise of Government 8 (J.W. Gough rev. ed. 1976) (3d ed. 1698) (transgressions should only "be punished to that degree, and with so much severity, as will suffice to make it an ill bargain to the offender, give him cause to repent, and terrify others from doing the like").

historical precedent for the argument that disenfranchisement is meant to be an additional punishment for the commission of a crime." Gary L. Reback, Note, *Disenfranchisement of Ex-Felons: A Reassessment*, 25 Stan. L. Rev. 845, 856-57 (1973). Now that the anti-social voter justification has become constitutionally suspect, Florida may very well be anxious to invent alternative justifications.

Even if there were historical support for the notion that lifetime disenfranchisement laws were intended to punish, that justification would nonetheless be tenuous because such laws serve no valid penological purpose. See *Coker* v. *Georgia*, 433 U.S. 584, 592 (1977) (holding that a sanction is beyond the state's authority to inflict if it makes "no measurable contribution" to acceptable penal goals). Lifetime disenfranchisement laws cannot be legitimately regarded as a form of punishment because they do not promote any of the four traditional goals of punishment: rehabilitation, deterrence, incapacitation, and retribution. See *Ewing* v. *California*, 538 U.S. 11, 25 (2003) (listing the four standard justifications that might inform a state's sentencing scheme).

1. Lifetime felon disenfranchisement laws fail to rehabilitate ex-felons. Indeed, such laws are fundamentally premised on the belief that former offenders are unredeemable and will never be able to vote responsibly again. See Nora V. Demleitner, *Continuing Payment on One's Debt to Society: The German Model of Felon Disenfranchisement as an Alternative*, 84 Minn. L. Rev. 753, 782 (2000); Note, *The Disenfranchisement of Ex-Felons: Citizenship, Criminality, and "The Purity of the Ballot Box"*, 102 Harv. L. Rev. 1300, 1316 (1989).

In fact, the empirical evidence supports precisely the opposite conclusion. Re-enfranchising former offenders decreases recidivism rates. Christopher Uggen et al., *"Less Than the Average Citizen": Stigma, Role Transition and the Civic Reintegration of Convicted Felons*, *in* After Crime and Punishment: Ex-Offender Reintegration and Desistance from

Crime 263 (Shadd Maruna & Russ Immarigeon eds. 2002). Empirical studies indicate that – even controlling for factors like criminal history, class, race, and gender – there is a statistical correlation between voting and lower rates of arrest, incarceration, and self-reported criminal behavior. Christopher Uggen & Jeff Manza, *Voting and Subsequent Crime and Arrest: Evidence from a Community Sample*, 36 Colum. Hum. Rts. L. Rev. 193, 195-96, 213 (2004). Just as prior empirical studies have demonstrated that ex-felons who enter stable work and family relationships are more likely to desist from future crime, John Laub et al., *Trajectories of Change in Criminal Offending: Good Marriages and the Desistance Process*, 63 Am. Soc. Rev. 225, 237 (1998); Robert Sampson & John Laub, *Crime and Deviance over the Life Course: The Salience of Adult Social Bonds*, 55 Am. Soc. Rev. 609, 617-18 (1990), those who vote are far less likely to be arrested again than those who do not vote, Uggen & Manza, *Voting and Subsequent Crime and Arrest* at 204-05.

For many ex-felons, the restoration of the right to vote provides a clear marker of civic reintegration and is a key component of changing the former offender's identity and self-image, "from one capable of self-aggrandizing behavior that victimizes others, to one also capable of behavior that supports achievement of broader social causes." Gordon Bazemore & Jeanne B. Stinchcomb, *Civic Engagement and Reintegration: Toward a Community-Focused Theory and Practice*, 36 Colum. Hum. Rts. L. Rev. 241, 262 (2004). Conversely, the refusal of the state to restore voting rights can stand as a major impediment to ex-felons who yearn to lead an upstanding life. See, *e.g.*, Uggen, "*Less Than the Average Citizen*," at 274-75 (recounting ex-felon's statement that losing the right to vote was "just like a little salt in the wound," and that he "would like to someday feel like a, quote, 'normal citizen,' a contributing member of society,"

but found it extremely difficult when he was reminded every election of his status as an ex-felon).[6]

While the act of casting a ballot is unlikely to be the sole factor in turning a former offender's life around, restoring an individual's right to vote is a critical component of encouraging a successful reintegration into society, and promoting healthy civic engagement among ex-felons and their communities alike.

2. Nor can disenfranchisement be justified as a deterrent of criminal behavior. It is unlikely that an individual who is not deterred by the prospect of imprisonment or fines will be dissuaded by the threat of losing his right to vote. Moreover, many individuals are unaware that permanent disenfranchisement is a consequence of felony conviction. Cf. Gabriel J. Chin & Richard W. Holmes, Jr., *Effective Assistance of Counsel and the Consequences of Guilty Pleas*, 87 Cornell L. Rev. 697 (2002) (noting that individuals need not be informed even when pleading guilty that disenfranchisement is a collateral consequence of conviction).

3. Lifetime disenfranchisement also bears little or no relation to incapacitation goals, except insofar as it perhaps

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[6] The idea that enfranchisement contributes to social responsibility has a long pedigree. See Matthew A. Crenson & Benjamin Ginsberg, Downsizing Democracy: How America Sidelined Its Citizens and Privatized Its Public 66 (2002) (noting that during the civil rights movement, many members of the business community supported expanding voting rights for African Americans as a way of encouraging them to seek "to achieve their ends by voting rather than demonstrating"); Journal of Debates and Proceedings in the Convention of Delegates Chosen to Revise the Constitution of Massachusetts 253 (Da Capo 1970) (1853) (In the 1820 Massachusetts constitutional convention, one advocate of enfranchising laborers without property argued, "[b]y refusing this right to them, you array them against the laws; but give them the rights of citizens—mix them with the good part of society, and you disarm them.").

impedes the ability of an infinitesimally small group of ex-felons to commit voting-related crimes. Given that only a minuscule percentage of those affected by Florida's disenfranchisement laws were convicted of committing voting-related crimes, incapacitation cannot serve as more than a tenuous justification.

4. Finally, lifetime disenfranchisement provisions cannot be justified as appropriate retribution. Retributive theory demands that the punishment be proportional to the gravity of the defendant's conduct. Revoking an individual's right to vote for the rest of his life is such a severe response in proportion to many of the acts that constitute a felony in Florida that punishment cannot serve as a legitimate justification for lifetime disenfranchisement laws. See *Coker*, 433 U.S. at 592 (holding that a sanction is beyond the state's authority to inflict if it is "grossly out of proportion to the severity of the crime").

The severity of lifetime disenfranchisement is undisputed:

> [T]he disenfranchised is severed from the body politic and condemned to the lowest form of citizenship, where voiceless at the ballot box * * * disinherited [, he] must sit idly by while others elect his civil leaders and while others choose the fiscal and governmental policies which will govern him and his family.

McLaughlin v. *City of Canton*, 947 F. Supp. 954, 971 (S.D. Miss. 1995).

Yet this harsh response is felt by former offenders of every stripe in Florida: "a felon convicted of the lowest felony in Florida loses his right to vote for life, as does a serial murderer." Joan Petersilia, When Prisoners Come Home: Parole and Prisoner Reentry 137 (2003). Not only murderers incarcerated for life lose their right to vote; so too can those convicted of writing a bad check, trespassing on commercial horticultural property, or merely accessing the internet

through a neighbor's wireless signal. See Fla. Stat. ch. 832.05(2) (2004) (making it a third-degree felony to issue a bad check for over $150 with knowledge of insufficient funds); Fla. Stat. ch. 810.09(2)(e) (2002) (making it a third-degree felony to trespass on commercial horticultural property); *Man Held in Theft of Wireless Web Access*, Miami Herald, July 8, 2005, at B6 (reporting that officials had charged a man with third-degree felony for connecting to the Internet through a neighbor's unsecured wireless signal pursuant to Fla. Stat. ch. 815.06 (2001)). Revoking a former offender's right to vote for life is so disproportionate to these kinds of transgressions that lifetime disenfranchisement laws cannot be defended on the ground that they represent a reasonable, proportional punitive measure. Indeed, the fact that only three states continue to deny the right to vote to all ex-offenders who have completed their sentences reflects the national consensus[7] that such laws are disproportionate. The magnitude and consistency of change since this Court's 1974 decision in *Richardson*, when twenty-eight states inflicted lifetime disenfranchisement, are even more pronounced than the sixteen-year shift that convinced this Court to prohibit the

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[7] On the international front, the United States is the only democracy that indefinitely disenfranchises criminals who have not committed voting-specific infractions. The supreme courts of Canada and South Africa recently issued decisions requiring their governments to permit even incarcerated citizens to vote. See *Sauve* v. *Canada*, [2002] 3 S.C.R. 519 (Can.); *August* v. *Electoral Comm'n* 1999 (3) SA 1 (CC) (S. Afr.). Countries such as France, Germany, and Greece disqualify only some classes of incarcerated offenders from voting, while other countries – including Australia, New Zealand, and Sri Lanka – limit the voting rights only of those serving sentences of a specified length. See *August*, *supra*, at 15 n.30. See also *Hirst* v. *The United Kingdom*, Application No. 74025/01 (Eur. Ct. Hum. Rts. Oct. 6, 2005) (holding that a general and automatic disenfranchisement of all convicted and incarcerated prisoners violates Article 3 of Protocol 1 of the Convention for the Protection of Human Rights and Fundamental Freedoms).

executions of mentally retarded criminals under the Eighth Amendment. *Atkins* v. *Virginia*, 536 U.S. 304, 313-17 (2002).

C. The Tenuousness of the Asserted Justifications for Lifetime Disenfranchisement Laws Is Reinforced By the Significant Harms They Inflict on the Political Process.

Lifetime felon disenfranchisement laws do far more harm than good. As *amicus* has already noted, the empirical evidence suggests that by preventing citizensfrom fully reintegrating into society, such laws may increase recidivism rates. Just as important, lifetime disenfranchisement provisions may suppress voting among law-abiding citizens in communities disproportionately affected by the criminal justice system.

First, the enforcement of lifetime criminal disenfranchisement laws results in the purging of thousands of law-abiding citizens from voter rolls. Second, law-abiding individuals in communities disproportionately affected by the criminal justice system vote at reduced rates in states with lifetime disenfranchisement laws because they come to believe that their votes are less meaningful.

1. Official investigations of the purge of Florida's election rolls before the 2000 election confirm that thousands of law-abiding citizens were barred from voting because their names were similar to those on a sloppily generated list of convicted felons. U.S. Commission on Civil Rights, *Voting Irregularities*, *supra*. The U.S. Commission on Civil Rights conducted an extensive public investigation of voting irregularities in Florida during the 2000 election and uncovered disenfranchisement of law-abiding citizens that was "not isolated or episodic." *Id.* at ch. 9. For example, Miami-Dade County's purge list had a staggering 14.1% error rate, meaning that almost one out of every seven people on the list was purged in error. *Id.* at ch. 1. To make matters worse, "African Americans had a significantly greater chance

of being listed on Florida's mandated purge list," *id.* at ch. 9, a fact that led the Commission to conclude that Florida's use of voter purge lists "ha[d] a disproportionate impact on African Americans," *id.* at ch. 1. Restoring voting rights to former offenders would thus also protect the voting rights of thousands of law-abiding citizens caught in the net of Florida's flawed enforcement mechanism.

2. Even if Florida devised a flawless method of enforcement, its lifetime disenfranchisement law would still stifle voter participation in communities disproportionately affected by the criminal justice system. One recent empirical study found that lifetime disenfranchisement laws diminish voter turnout among law-abiding voters. See Aman McLeod et al., *The Locked Ballot Box*, 11 Va. J. Soc. Pol'y & L. 66 (2003). Notably, this effect could be traced primarily to communities with disproportionately high rates of former offenders among the population. *Id.* at 79.

Conversely, in states without lifetime disenfranchisement laws, communities with high concentrations of ex-felons voted at rates similar to those of non-affected communities, suggesting that disenfranchisement was the source of the dampening effect. *Ibid.* In all likelihood, when disenfranchisement significantly dilutes the vote in disproportionately affected neighborhoods, law-abiding citizens begin to feel ignored by political candidates, leading in turn to disillusionment with the political process and even lower rates of civic participation. Dorothy E. Roberts, *The Social and Moral Cost of Mass Incarceration in African American Communities*, 56 Stan. L. Rev. 1271, 1293 (2004).

CONCLUSION

For the foregoing reasons, as well as those set forth in the petition, certiorari should be granted.

Respectfully submitted,

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IN THE
Supreme Court of the United States

THOMAS JOHNSON, *et al.*,
Petitioners,

v.

JEB BUSH, GOVERNOR OF FLORIDA, *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

BRIEF FOR *AMICI CURIAE* THE NATIONAL BLACK POLICE ASSOCIATION, THE NATIONAL LATINO OFFICERS ASSOCIATION OF AMERICA, AND FORMER LAW-ENFORCEMENT OFFICIALS ZACHARY W. CARTER, KENDALL COFFEY, VERONICA F. COLEMAN-DAVIS, ERIC H. HOLDER, JR., WALTER C. HOLTON, JR., G. DOUGLAS JONES, WILMA A. LEWIS, J. BRAD PIGOTT, JAMES K. ROBINSON, HOWARD M. SHAPIRO, PAUL SHECHTMAN, SETH P. WAXMAN, AND WILLIAM D. WILMOTH, IN SUPPORT OF PETITIONERS

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INTEREST OF *AMICI CURIAE*[1]

Amici are current and former law-enforcement officials, and their professional associations, who share an interest in seeing that permanent felony disenfranchisement laws that disproportionately deny minority citizens the right to vote can be challenged under the Voting Rights Act. *Amici* submit that, contrary to Respondents' assertion, Florida's "penal interests" are not well served by permanently disenfranchising ex-felons — including hundreds of thousands of African-American and Latino citizens who have served their sentences and are no longer imprisoned, on parole, or on probation. *Amicus* The National Black Police Association (NBPA) and *amicus* The National Latino Officers Association of America (NLOA) together represent more than 45,000 uniformed and civilian law-enforcement officers and employees at the city, state, and federal level. NBPA and NLOA are dedicated to promoting effective law enforcement and to building stronger bonds between minority law-enforcement officers and the communities they serve. The individual *amici* are primarily former federal prosecutors and have served in high-level law-enforcement positions ranging from United States Attorney to Solicitor General to Deputy Attorney General to General Counsel of the FBI.[2]

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[1] Counsel of record for all parties have consented to the filing of this brief, and letters of consent have been filed with the Clerk. Counsel for the parties did not author the brief in whole or in part. No person or entity other than *amici* and their counsel made a monetary contribution to the preparation or submission of this brief.

[2] The individual *amici* are Zachary W. Carter, Kendall Coffey, Veronica F. Coleman-Davis, Eric H. Holder, Jr., Walter C. Holton, Jr., G. Douglas Jones, Wilma A. Lewis, J. Brad Pigott, James K. Robinson, Howard M. Shapiro, Paul Shechtman, Seth P. Waxman, and William D. Wilmoth.

INTRODUCTION AND SUMMARY OF ARGUMENT

At issue in this case is the applicability of Section 2 of the Voting Rights Act (the "VRA" or the "Act")[3] to a provision of the Florida Constitution that permanently bars from voting *any* person who has a prior felony conviction.[4] There is today no more sweeping felony disenfranchisement law in the Nation.

Florida's law currently disenfranchises 5.2% of the State's adult population — more than 600,000 people who have served their full sentences, including not only imprisonment but also probation and parole. Significantly for purposes of analysis under the VRA, this exclusion falls disproportionately on minority citizens. Blacks are roughly 2.4 times as likely as non-blacks to suffer disenfranchisement, as 10.5% of black adults (approximately 167,000 persons), but only 4.4% of non-black adults, are deprived of the right to vote by virtue of being ex-felons.[5]

Florida's felony disenfranchisement provision was first inserted into the state constitution in 1868 to "keep[] blacks from voting" in the wake of their emancipation from slavery.[6] A century later, in 1968, Florida reenacted that constitutional provision almost verbatim: Both versions stated that no "person convicted of a felony . . . [shall] be

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[3] Pub. L. No. 89-110, 79 Stat. 437 (1965), *as amended*, Pub. L. No. 97-205, 96 Stat. 134 (1982), 42 U.S.C. § 1973.

[4] FLA. CONST. art. VI, § 4 (1968). Florida has a discretionary clemency process which can restore an individual ex-felon's voting rights; but it affects only a tiny fraction of ex-felons in any given year, and it disproportionately benefits whites. *See* Pet. App. 263a-270a, 361a-373a.

[5] *See* Pet. App. 256a, 296a-297a; *see also id.* at 259a-260a, 301a-302a, 310a.

[6] Pet. App. 159a, 214 F. Supp. 2d 1333, 1339 (S.D. Fla. 2002); *see id.* at 197a-199a, 305a; *see also id.* at 18a, 405 F.3d 1214, 1223 (11th Cir. 2005) (en banc).

qualified to vote . . . ."[7] But Florida offered no official explanation of why it reenacted a law that, for 100 years, had persistently disenfranchised African-Americans at much higher rates than whites.

Had Florida simply left the 1868 provision in place, this would be an easy case. Under this Court's unanimous precedent in *Hunter v. Underwood*,[8] the Constitution forbids any state law that was enacted "for the purpose of disfranchising blacks" and that continues to have "a discriminatory effect on blacks" — which the *Hunter* Court found to be the case in Alabama, where the challenged law rendered blacks "at least 1.7 times as likely as whites to suffer disfranchisement."[9]

But the court below treated Florida's 1968 reenactment of its felony disenfranchisement provision as having expunged the law's discriminatory intent.[10] The validity of that ruling — a question also presented by the Petition, but not addressed in this *amicus* brief — ultimately may not matter here if Petitioners can prevail under amended Section 2 of the Voting Rights Act. Congress amended Section 2 in 1982 precisely to free voting-rights plaintiffs from having to prove discriminatory intent when challenging a voting qualification or practice that has discriminatory effects. That Congress has allowed plaintiffs to prevail absent any

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[7] The 1868 law provided in part: "[N]or shall any person convicted of a felony be qualified to vote at any election unless restored to civil rights." FLA. CONST. OF 1868 art. XIV, § 2, Pet. App. 190a. The present law provides: "No person convicted of a felony, or adjudicated in this or any other state to be mentally incompetent, shall be qualified to vote or hold office until restoration of civil rights or removal of disability." FLA. CONST. art. VI, § 4 (1968), Pet. App. 192a.

[8] 471 U.S. 222 (1985).

[9] *United States v. Armstrong*, 517 U.S. 456, 467 (1996) (describing *Hunter*'s holding) (internal quotation marks omitted).

[10] *See* Pet. App. 17a-25a, 405 F.3d at 1223-26.

evidence of discriminatory intent, however, does not render irrelevant the State's asserted interest in a voting qualification or practice challenged under Section 2. Indeed, the plain text of amended Section 2 instructs courts to consider "the totality of circumstances,"[11] and the Senate Report accompanying the 1982 amendments listed, as one potentially probative circumstance, "whether the policy underlying the [State's] use of [the challenged practice] is *tenuous*."[12] The "tenuousness" factor prevents States from defending discriminatory voting practices by pointing to some seemingly race-neutral policy that is in fact flimsy when compared to the loss of the franchise.

In this litigation, Respondents have asserted that Florida's permanent disenfranchisement of ex-felons serves the State's "penal interests."[13] As this brief shows, there could hardly be a flimsier defense. *First*, historically, felony disenfranchisement laws have never been justified as a means for advancing a State's penal goals. *Second*, permanently disenfranchising ex-felons does not materially serve the traditional, legitimate penal interests of prevention, deterrence, or retribution — and it positively *disserves* the goal of rehabilitating ex-offenders.

The Eleventh Circuit erred by swallowing the State's mischaracterization of felony disenfranchisement as "a punitive device stemming from criminal law."[14] By contrast,

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[11] 42 U.S.C. § 1973(b).

[12] S. Rep. No. 97-417, at 29 (1982) (emphasis added) [hereinafter "S. Rep."], *reprinted in* 1982 U.S.C.C.A.N. 177, 207, *and quoted in Thornburg v. Gingles*, 478 U.S. 30, 37 (1986), *and Johnson v. De Grandy*, 512 U.S. 997, 1010 n.9 (1994).

[13] *E.g.*, Mem. of Law in Supp. of Defs.' Mot. for Summ. J., at 20.

[14] Pet. App. 29a, 405 F.3d at 1228.

the Ninth Circuit's decision in *Farrakhan v. Washington*[15] was based in part on plaintiffs' "evidence of the tenuous policy justifications for [Washington State's] felon disenfranchisement law."[16] Moreover, as the court below acknowledged, the holdings of the Ninth and Eleventh Circuits directly conflict on the key question presented here: whether Section 2 applies to felony disenfranchisement.[17] Because these decisions conflict on an important question of federal law that has not been, but should be, settled by this Court, the Petition should be granted.

REASONS FOR GRANTING THE PETITION

I. Under Section 2 of the Voting Rights Act, a "Voting Qualification" that Denies Minority Citizens Equal Access to the Ballot Must Be Justified by a Significant, Non-Tenuous State Interest.

Nothing in the text of the Voting Rights Act would exclude felony disenfranchisement laws from the Act's broad coverage. Section 2 of the VRA prohibits States from imposing or applying any "*voting qualification* or prerequisite to voting or standard, practice, or procedure . . . in a manner which results in a denial or abridgement of the right of any citizen of the United States to vote on account of race or color" or membership in a language-minority group.[18] As amended in 1982, Section 2 focuses on results, and requires no proof of discriminatory intent.[19] In evaluating whether a given practice violates Section 2, courts must

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[15] 338 F.3d 1009 (9th Cir. 2003), *reh'g en banc denied*, 359 F.3d 1116 (9th Cir.), *cert. denied*, 125 S. Ct. 477 (2004).

[16] *Id.* at 1013; *see also id.* at 1015 (quoting the Senate Report on "tenuous" state policies); *id.* at 1020 n.15 (discussing plaintiffs' evidence of tenuousness).

[17] *See* Pet. App. 25a-26a, 405 F.3d at 1227.

[18] 42 U.S.C. § 1973(a) (emphasis added).

[19] *See Chisom v. Roemer*, 501 U.S. 380, 383 (1991).

inquire whether, "based on the totality of circumstances, it is shown that the political processes leading to nomination or election in the State . . . are not equally open to participation by members of a [protected] class of citizens . . . in that its members have less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice."[20]

This Court has identified several objective factors that, under Section 2's "totality of circumstances" test, may support a claim of vote dilution or vote denial.[21] These factors (known as the "Senate factors") were derived from the Senate Report that accompanied the 1982 amendments to Section 2. They include (1) a history of official discrimination touching on the right to vote, (2) racially polarized voting, (3) practices that may enhance the opportunity for discrimination, (4) whether members of minority groups bear the effects of past discrimination, (5) racial appeals in campaigns, (6) the extent to which members of minority groups have been elected to public office, and — most significantly here — (7) whether "the policy underlying the State's . . . use of the contested practice or structure is tenuous."[22] There is no reason why these Senate factors cannot be applied in challenges to felony disenfranchisement laws. Given *amici*'s experience in law enforcement, we focus our discussion on the last factor — the tenuousness of the State's purported law-enforcement interest in permanently disenfranchising ex-felons.

This inquiry into whether the State's interest is tenuous plays a key role under Section 2. The greater the disparate impact the challenged voting practice has on a protected

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[20] 42 U.S.C. § 1973(b).

[21] *See, e.g., De Grandy*, 512 U.S. at 1010-11 & n.9 (citing S. Rep. at 28-29); *Gingles*, 478 U.S. at 44-45 (same).

[22] *Gingles*, 478 U.S.. at 45.

group, the greater is the State's burden to justify that practice. Where a practice has a racially disparate impact, an inquiry into the State's interest may "show whether a state's policy [is] pre-textual,"[23] "indicate that the policy is unfair,"[24] or serve as "circumstantial evidence that the system is motivated by discriminatory purposes and has a discriminatory result."[25]

Even a practice serving a legitimate state interest may be invalid under Section 2 if it significantly impedes a protected group's electoral opportunities.[26] Thus, for example, redistricting plans enacted in good faith and for nondiscriminatory purposes are routinely invalidated under Section 2 because they dilute minority voting strength.[27] Courts are perfectly capable of engaging in such balancing in felony disenfranchisement cases as well.

II. Felony Disenfranchisement Laws Have Had the Purpose and Effect of Discriminating Against Minorities — The Very Evils that Congress Intended to Target in the Voting Rights Act.

Felony disenfranchisement in the United States has a deeply discriminatory history. During and after Reconstruction, Southern States enacted or amended

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[23] *Cousin v. McWherter*, 46 F.3d 568, 576 (6th Cir. 1995).

[24] *United States v. Marengo County Comm'n*, 731 F.2d 1546, 1571 (11th Cir. 1984).

[25] *McMillan v. Escambia County*, 748 F.2d 1037, 1045 (5th Cir. 1984).

[26] *See* S. Rep. at 29 n.117 ("[A] practice premised on a racially neutral policy would not negate a plaintiff's showing through other factors that the challenged practice denies minorities fair access to the [political] process."), *reprinted in* 1982 U.S.C.C.A.N. at 207 n.117.

[27] *See, e.g., Clark v. Calhoun County*, 88 F.3d 1393, 1401 (5th Cir. 1996) (finding a § 2 violation in a redistricting plan despite upholding the district court's finding that "attempting to maintain districts with equal road mileage is nonsensous").

disenfranchisement schemes to diminish the electoral strength of the newly freed slaves.[28] Florida's disenfranchisement law was propounded by a so-called "Moderate Republican" faction whose leader later boasted that his work at the 1868 constitutional convention had kept Florida from becoming, in his words, "niggerized."[29] To this end, the "Moderates" expanded the list of crimes triggering disenfranchisement to include those crimes that blacks were believed more "prone" to commit. That strategy worked: A leader of the "Radical Republican" faction testified at the time that the 1868 constitution "disfranchises thousands of the colored voters."[30]

Congress addressed the evils of racially discriminatory felony disenfranchisement laws when it passed the Voting Rights Act and amended it in 1982. Indeed, in *Richardson v. Ramirez*,[31] this Court had all but invited Congress to do so. The *Richardson* Court rejected a nonracial equal-protection challenge to a felony disenfranchisement law based on the affirmative sanction for disenfranchisement that appears in

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[28] *See Hunter v. Underwood*, 471 U.S. at 229 (describing the "movement that swept the post-Reconstruction South to disenfranchise blacks"); *Cotton v. Fordice*, 157 F.3d 388, 391 (5th Cir. 1998) ("[Felony disenfranchisement statutes were] enacted in an era when southern states discriminated against blacks by disenfranchising convicts for crimes that, it was thought, were committed primarily by blacks."); *Ratliff v. Beale*, 20 So. 865, 868 (Miss. 1896) (tracing devices, including criminal disenfranchisement, added to the 1890 Mississippi Constitution to "obstruct the exercise of the franchise by the negro race"); *see also* Andrew L. Shapiro, *Challenging Criminal Disenfranchisement Under the Voting Rights Act: A New Strategy*, 103 YALE L.J. 537, 537-42 (1993).

[29] Pet. App. 305a; *see also id.* at 224a.

[30] II Exs. to Pls.' Resp. to Defs.' Mot. for Summ. J., at 597; *see also* Pet. App. 206a-208a, 229a-230a.

[31] 418 U.S. 24 (1974).

the Fourteenth Amendment's Penalty Clause.[32] The Court sympathized with plaintiffs' claim that felony disenfranchisement's historic rationales were "outmoded" and with "the more modern view . . . that it is essential to the process of rehabilitating the ex-felon that he be returned to his role in society as a fully participating citizen when he has completed the serving of his term."[33] But those arguments, the Court explained, would best be directed to "the legislative forum which may properly weigh and balance them."[34]

Congress — in exercising its enforcement power under the Fifteenth Amendment — weighed the relevant factors when amending the Voting Rights Act in 1982. And Congress concluded that a "voting *qualification* or prerequisite to voting or [voting] standard, practice, or procedure"[35] — terms that surely encompass felony disenfranchisement laws generally and the Florida law in particular (since it provides that "[n]o person convicted of a felony . . . shall be *qualified* to vote")[36] — is presumptively illegal if it disparately impacts minority citizens and is maintained for tenuous reasons. Indeed, the 1982 congressional report laying out the "Senate factors" expressly instructed courts to consider the very tenuousness of state policies that the *Richardson* Court's opinion had highlighted.

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[32] *See id.* at 54-55.

[33] *Id.* at 55.

[34] *Id.*

[35] 42 U.S.C. § 1973(a) (emphasis added).

[36] FLA. CONST. art. VI, § 4 (1968) (emphasis added).

III. Historically, Felony Disenfranchisement Laws Have Never Been Justified as a Means for Advancing a State's Penal Interests.

The history of felony disenfranchisement laws reveals that, at the time of their enactment, they were never justified as a component of a law-enforcement program. Indeed, *amici* are unaware of any State enacting a felony disenfranchisement law based on a considered judgment that the law was needed to advance the State's penal objectives.

The disconnect between law-enforcement goals and felony disenfranchisement has deep roots. In ancient times, felony disenfranchisement was part of a system of ostracism or banishment, beginning with the ancient Roman notion of "infamia," a pronouncement of moral censure imposed on citizens who committed immoral or criminal acts.[37] In the Middle Ages, Germanic tribes employed the practice of "outlawry" to expel an offender from the community, causing him to be deprived both of civil rights and of society's protection. The outlaw's property was confiscated, and he could be killed with impunity by anyone.[38] Following the Middle Ages, in continental Europe, outlawry was transformed by statutory enactment into "civil death," which terminated the offender's legal existence. Dishonor and incapacity often were imposed on the offender's descendants, as well.[39]

In England, the method of imposing civil disabilities under the common law was called "attainder." Upon conviction for a felony, the offender was pronounced "attainted" and was subjected to numerous penalties,

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[37] *See* Howard Itzkowitz & Lauren Oldak, Note, *Restoring the Ex-Offender's Right to Vote: Background and Developments*, 11 AM. CRIM. L. REV. 721, 721-22 (1973).

[38] *See id.* at 722-23.

[39] *See id.* at 723 & n.15.

including forfeiture (the confiscation of chattel and other goods) and "corruption of the blood," which left the attainted person unable to inherit or devise real property and escheated all his property to the lord of the estate. The offender also lost his civil rights, including the right to vote, as well as the rights to bring suit and to appear as a witness in court.[40] These penalties were "based on the fiction that the criminal's act was evidence that he and his entire family were corrupt and therefore unworthy of being feudal tenants."[41]

In America, of course, corruption of blood was banned by the Constitution (except under limited circumstances related to treason),[42] and the notion of "civil death" was firmly rejected as part of American common law.[43] As *amici* explained above, felony disenfranchisement in America is therefore more a product of racially discriminatory legislation during and after Reconstruction. But neither in our history nor in Europe's has felony disenfranchisement been justified as a means for advancing penal interests.

IV. Felony Disenfranchisement Laws Are Not Entitled to *Sui Generis* Treatment as Part of the Criminal Process, Because Permanently Disenfranchising Ex-Felons Does Not Materially Advance Any Legitimate Penal Interest.

Today, felony disenfranchisement laws in the States encompassed by the Eleventh Circuit are the only "voting qualifications" that fall entirely beyond the reach of Section 2 of the Voting Rights Act. But Congress could not rationally have intended, as the Eleventh Circuit (contrary to

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[40] *See id.* at 724.

[41] Note, *The Disenfranchisement of Ex-Felons: Citizenship, Criminality, and "The Purity of the Ballot Box,"* 102 HARV. L. REV. 1300, 1302 (1989) (citation and internal quotation marks omitted).

[42] *See* U.S. CONST. art. III, § 3, cl. 2.

[43] *See* Itzkowitz & Oldak, *supra* note 37, at 725.

the Ninth Circuit) held below, that laws serving no legitimate penal interest would be exempt from coverage under Section 2 of the VRA — a federal statute intended to root out state laws that disproportionately exclude minority citizens from the franchise for no good reason. Because permanent felony disenfranchisement laws perpetuate the kind of senseless exclusion that the Act was meant to eradicate, they must be actionable under the VRA.

Indeed, among respected authorities on criminal justice, there is a growing consensus against the disenfranchisement of ex-felons past the period of their sentence and post-release supervision. The American Bar Association and the American Law Institute (ALI) have long opposed such disenfranchisement because the "stigma of exclusion . . . deter[s] rehabilitation and increase[s] the likelihood of recidivism."[44] The ALI's Model Penal Code prohibits disenfranchisement that continues after "a sentence of imprisonment" has ended.[45]

More recently, the American Correctional Association has adopted a resolution opposing disenfranchisement after "completion of the offender's sentence including community supervision" because it "work[s] against the successful reentry [into the community] of offenders as responsible,

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[44] Andrew L. Shapiro, *The Disenfranchised*, THE AMERICAN PROSPECT at 60 (Nov.-Dec. 1997); *see* American Bar Association, *Standards for Criminal Justice 23-8.4: Voting Rights* (2d ed. 1983).

[45] MODEL PENAL CODE § 306.3 (2001). Similarly, the United Nations Human Rights Committee, which reviews adherence to the International Covenant on Civil and Political Rights (ICCPR), to which the United States is a signatory, has rejected the automatic imposition of lifetime disenfranchisement. *See* General Comment Adopted by the Human Rights Committee Under Article 40, Paragraph 4 of the ICCPR, CCPR/C/21/Rev.1/Add.7, Aug. 27, 1996, Annex V(1), *quoted in* JAMIE FELLNER & MARC MAUER, LOSING THE VOTE: THE IMPACT OF FELONY DISENFRANCHISEMENT LAWS IN THE UNITED STATES 21 (1998).

productive citizens."[46] And a recent president of the National District Attorneys Association likewise has voiced concern about creating a "subclass of citizens who, even after doing what they were ordered to do by a judge, are . . . disenfranchised from the vote and continually labeled as criminals. To no one's surprise, they may believe they have no recourse but to continue to live outside the law."[47]

Faced with this growing consensus in the law-enforcement and correctional community, the Eleventh Circuit blithely accepted Florida's conclusory assertion that permanently disenfranchising ex-felons furthers the State's penal interests.[48] But as *amici* show here, the permanent exclusion of a citizen from the political community does not materially advance any accepted goal of the criminal-justice system, such as prevention, deterrence, or retribution. And a lifetime exclusion from voting gravely disserves the State's interest in rehabilitating the offender and reintegrating him into civil society.

A. Incapacitation/Prevention

The incapacitation rationale for punishment is that a person who has committed a crime is likely to do so again and that punishment is therefore necessary to prevent him from breaking the law again. Typically, this punishment takes the form of physically incarcerating the offender. In this case, Florida has articulated one such preventive rationale: It asserted below, without elaboration, that

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[46] American Correctional Association, Resolution on the Restoration of Voting Rights (Jan. 14, 2004), *available at* http://www.aca.org/pastpresentfuture/Winter_2004_Resolutions.asp#15.

[47] Robert M. A. Johnson, *Message from the President — Collateral Consequences*, National District Attorneys Association (May/June 2001), *available at* http://www.ndaa-apri.org/ndaa/about/president_message_may_june_2001.html.

[48] *See* Pet. App. 29a, 405 F.3d at 1228.

permanently disenfranchising all ex-felons is necessary to "insur[e] the integrity of elections."[49]

This justification is unpersuasive. The State has identified no evidence that ex-offenders who have completed their terms of incarceration and supervision are prone to commit offenses affecting the integrity of elections. And *amici* are unaware of any such evidence. Notably, Florida has not limited its permanent ban on voting to those felons who have previously committed election-related offenses.[50] Permanently disenfranchising *all* ex-felons is a wildly overbroad response to the State's asserted concern.

Florida also articulates a preventive rationale when it claims that ex-felons are "unlikely to exercise [the right to vote] responsibly."[51] The theory apparently is that they will vote against pro-law-enforcement candidates and initiatives. But this asserted concern about "the purity of the ballot box" surely is not a valid basis for permanent disenfranchisement. In the many States that allow ex-felons to vote, there is no evidence that they vote in bloc, let alone in a socially disruptive manner. Moreover, excluding a group from the electorate based on predictions about how they would vote is flatly unconstitutional. In *Carrington v. Rash*,[52] this Court considered Texas's constitutional provision prohibiting military personnel who moved to Texas from voting. Texas claimed a "legitimate interest in immunizing its elections from the concentrated balloting of military personnel, whose

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[49] Mem. of Law in Supp. of Defs.' Mot. for Summ. J., at 20.

[50] *See* Itzkowitz & Oldak, *supra* note 37, at 738-39 (possibility that election offense may be committed by class of ex-criminals is negligible).

[51] Reply Brief in Supp. of Defs.' Mot. for Summ. J., at 13 n.15.

[52] 380 U.S. 89 (1965).

collective voice may overwhelm a small local civilian community."[53] This Court struck down the law:

> "Fencing out" from the franchise a sector of the population because of the way they may vote is constitutionally impermissible. "[T]he exercise of . . . rights so vital to the maintenance of democratic institutions" cannot constitutionally be obliterated because of a fear of the political views of a particular group of bona fide residents.[54]

Indeed, the Voting Rights Act pointedly prohibits States from conditioning the right to vote on any demonstration of knowledge, aptitude, or character.[55]

B. Deterrence

Perhaps the most commonly asserted goal of punishment is to deter future criminal conduct, whether by the particular offender (specific deterrence) or by others (general deterrence). There is, however, no basis whatsoever to conclude that permanently disenfranchising ex-felons serves to deter them from committing new crimes, or to deter others from committing felonies and joining their ranks. Notably, while asserting that this law serves its penal interests, even Florida has never claimed that disenfranchisement has value as a deterrent to crime.

Rather, deterrence flows from the other penal consequences of a felony conviction, including a lengthy term of incarceration (by definition, a felony carries a

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[53] *Id.* at 93.

[54] *Id.* at 94 (citation omitted).

[55] *See Oregon v. Mitchell*, 400 U.S. 112, 144-45 & n.9 (1970) (upholding the VRA provision that bars States from requiring voters to pass tests of "good moral character" or of "knowledge of any particular subject"); *see also Dillenburg v. Kramer*, 469 F.2d 1222, 1224 (9th Cir. 1972) (deriding "purity of the ballot box" as a "quasi-metaphysical invocation").

potential prison sentence of more than a year) and significant fines. If these consequences cannot deter a potential offender, it is not credible to suggest that the loss of voting rights upon concluding post-incarceration supervision would.

C. Retribution

Punishment may also be justified as a form of moral desert. The ancient notion of "civil death" — in which the offender was stripped of his civil rights — was understood in part as such a form of retribution. During ancient times, apart from losing the franchise, an offender was stripped of his chattel and other goods, deemed unfit to marry or to inherit property, and forbidden to possess or divide his estate for his heirs.[56]

We live in a very different era. For one thing, the Constitution imposes limits on retributive punishment, such as the Eighth Amendment's prohibitions on "excessive fines" and "cruel and unusual" punishments.[57] More generally, the law-enforcement community and society at large now recognize that a punishment can be morally justified as retribution only if it is reasonably proportionate in severity and duration to the crime in question.[58] Today, no one could seriously assert, for example, that permanently stripping all ex-felons of the right to marry or to inherit property would be a justifiable form of retribution.

In the context of the right to vote, *amici* believe that disenfranchisement after the ex-felon has served his term of

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[56] *See* Itzkowitz & Oldak, *supra* note 37, at 723, 736.

[57] U.S. CONST. amend. VIII.

[58] The penological principle of proportionality holds that "the severity of the criminal sanction should be limited by the seriousness of the offense and the relevant attributes of the offender." Jeremy Travis, *Invisible Punishment: An Instrument of Social Exclusion*, in INVISIBLE PUNISHMENT: THE COLLATERAL CONSEQUENCES OF MASS IMPRISONMENT 35 (Marc Mauer & Meda Chesney-Lind eds., 2002).

imprisonment and any subsequent period of official supervision is unjustifiably disproportionate. Once the State has relinquished any further claim to be otherwise punishing, reforming, or monitoring the ex-offender, there is no legitimate basis for stripping him of his right to participate in the electoral process. Such exclusion instead appears more akin to the types of denunciatory "shaming" and branding of offenders that have long been discredited as archaic. By modern standards, a collateral consequence like permanent disenfranchisement "runs counter to the adage that 'after the sentence is served, the offender has paid his or her debt to society.'"[59]

Laws mandating the life-long denial of voting rights permanently destroy the ex-offender's most direct form of participation in the central process of self-government and render the group of ex-felons invisible to elected officials. As one court has put it, disenfranchisement saddles one segment of the population with

> the harshest civil sanction imposed by a democratic society. When brought beneath its axe, the disenfranchised is severed from the body politic and condemned to the lowest form of citizenship, where voiceless at the ballot box . . . , the disinherited must sit idly by while others elect his civic leaders and while others choose the fiscal and governmental policies which will govern him and his family.[60]

Permanent disenfranchisement is unjustifiably disproportionate for a second reason. At common law, and

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[59] Nora V. Demleitner, *Preventing Internal Exile: The Need for Restrictions on Collateral Sentencing Consequences*, 11 STAN. L. & POL'Y REV. 153, 160-61 (1999) (citation and internal quotation marks omitted).

[60] *McLaughlin v. City of Canton*, 947 F. Supp. 954, 971 (S.D. Miss. 1995).

at the time the Reconstruction Amendments were ratified, relatively few offenses were deemed felonies, mostly involving violence or forceful invasions of property. Today, however, federal and state felony statutes apply to a broad range of activity, including countless regulatory violations, as reflected in the exponentially increasing number of Floridians to whom the State's disenfranchisement law applies. For example, it is a felony in Florida today for a wholesaler intentionally to sell malt beverages to a vendor without first allowing them to come to "rest at the [wholesaler's] licensed premises."[61]

Permanently banning voting by such a broad class of ex-offenders sweeps far beyond the original retributive logic of denying the franchise to a still-incarcerated violent felon. *Amici* therefore submit that, under Voting Rights Act analysis, the State's retributive interest in this penalty is tenuous at best.

D. Rehabilitation

The fourth and final goal of punishment is to rehabilitate the offender and reintegrate him into mainstream society. No State has an interest in creating a permanent underclass of ex-offenders who are blocked or inhibited by virtue of their prior offenses from contributing productively to the Nation, the polity, and their communities. But as *amici* know from their experiences in law enforcement, reintegrating an offender into civil society is a daunting challenge under the best of circumstances.[62]

Denying the right to vote only adds an additional barrier to successful reintegration, particularly where (as in Florida

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[61] FLA. STAT. ANN. § 561.5101 (West 2005).

[62] *See* Joan Petersilia, *When Prisoners Return to the Community: Political, Economic, and Social Consequences*, in NATIONAL INSTITUTE OF JUSTICE'S SENTENCING & CORRECTIONS: ISSUES FOR THE 21ST CENTURY 5 (2000).

today) this denial falls disproportionately on members of a racial minority group. As a past president of the American Society of Criminology recently observed, "denying large segments of the minority population the right to vote is likely to cause further alienation. Disillusionment with the political process also erodes citizens' feelings of engagement and makes them less willing to participate in local political activities and to exert informal social control in their community."[63] The State's interest in rehabilitation would be far better served by reenfranchising ex-offenders who have completed their terms of incarceration and supervision.

* * *

In this case, if Section 2 were to apply, Florida would bear a substantial burden of justification. The statistics set out at the start of this brief, and others identified by Petitioners, demonstrate that the State's permanent disenfranchisement of ex-felons lopsidedly bars African-American citizens from the voting booth. In addition, compelling evidence demonstrates that the motivation behind that law, as originally enacted, was to constrict the size and influence of the black electorate. Petitioners have further demonstrated that the other "Senate factors" heavily favor their claim of illegal vote denial. Further heightening the State's burden of justification is the utter absence of any legislative (or other) history corroborating the State's present claim that disenfranchisement was intended to advance the State's "penal interests."

Unfortunately, the court below never reached these issues, critical to hundreds of thousands of Florida citizens,

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[63] *Id.*; *see also United States v. K*, 160 F. Supp. 2d 421, 434 (E.D.N.Y. 2001) (reviewing the literature demonstrating that felony disenfranchisement laws have "frustrated the released felon's attempt to integrate himself or herself into society" and "serve to further estrange released offenders from mainstream society").

because it incorrectly held, contrary to the Ninth Circuit, that felony disenfranchisement laws are never subject to review under Section 2 of the Voting Rights Act.

CONCLUSION

The Court should grant the Petition for a Writ of Certiorari.

Respectfully submitted,

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